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Supreme Court, U.S.
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No. ---

In The
Supreme Court of the United States

STANLEY R. NICKELS,
Petitioner,

v.

GRAND TRUNK WESTERN RAILROAD, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court below erroneously interpreted the Federal Railroad Safety Act of 1970 ("FRSA") codified at 49 U.S.C. §20101 et seq. to preclude a Federal claim pursuant to the Federal Employers' Liability Act ("FELA") 45 U.S.C. §51 et seq. by an injured rail worker solely because a similar state common law claim would be preempted. This interaction of FRSA and FELA would be a question of first impression before this Court.

2. Whether the court below improperly relied upon a concern for uniformity instead of safety contrary to the safety objective of FRSA and the mandate expressed at 49 U.S.C. §103(c) which states that the greatest priority of Congress is the "highest degree of safety in railroad transportation."

3. Whether this Court should resolve the conflict currently present in the legal holdings of the Fifth and Sixth Circuit Courts of Appeal compared to the legal holdings of the Seventh and Ninth Circuit Courts of Appeal as to whether 49 C.F.R. §213.103 covers the subject of walkways adjacent to railroad tracks to preclude FELA causes of action based upon unsafe walking conditions.

PARTIES TO THE PROCEEDING

Petitioner

Stanley R. Nickels

Respondent

Grand Trunk Western Railroad Inc.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 560 F. 3d 426 (6th Cir. 2009). A copy of the Opinion is set forth in the Appendix hereto (App. 1a - 23a). The order of the United States Court of Appeals dated May 22, 2009 denying petitioner's Petition for Rehearing and Rehearing En Banc is set forth in the Appendix (App. 34a - 35a). The Opinion of the District Court for the Eastern District of Michigan is not officially reported but is available at 2007 U.S. Dist. LEXIS 88481 (E.D. Mich. 2007) and is set forth in the Appendix hereto (App. 24a - 33a).

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued an order denying petitioner's Petition for Rehearing and Rehearing En Banc on May 22, 2009. This Petition for Writ of Certiorari is filed within 90 days of that date. Jurisdiction is invoked pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. §2106.

STATUTORY PROVISIONS AND REGULATIONS

Federal Employers' Liability Act 45 U.S.C. §51

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia

or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Federal Railway Safety Act of 1970
49 U.S.C. §20101. Purpose

The purpose of this chapter is to promote safety in every area of railroad operations and reduce railroad related accidents and incidents.

49 U.S.C. §20102. Definitions

In this part-

(1) "railroad"-

(A) means any form of non-highway ground transportation that runs on rails or electromagnetic guideways, including -

(I) commuter or other shot-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(ii) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but

(B) does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(2) "railroad carrier" means a person providing railroad transportation.

49 U.S.C. §20103. General Authority

(A) Regulations and orders - The Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970.

49 U.S.C. §20106. Preemption

'(a) National Uniformity of Regulation - (1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practible.
'(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad safety matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order–

'(A) is necessary to eliminate or reduce an essentially local safety or security hazard;
'(B) is not incompatible with a law, regulation, or order of the United States Government; and
'(c) does not unreasonably burden interstate commerce.

'(b) Clarification Regarding State Law Causes of Action - (1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party-

'(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad

safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

'(B) has failed to comply with its own plan, rule or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

'(c) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

'(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

'(c) Jurisdiction - Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

49 C.F.R. 213.103

Unless it is otherwise structurally supported, all track must be supported by material which will:

(a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;

(b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by rails;

(c) Provide adequate drainage for the track; and

(d) Maintain proper track cross-level, surface, and alignment.

STATEMENT OF THE CASE

Summary of Facts:

Petitioner brought a cause of action against respondent pursuant to the Federal Employers' Liability Act ("FELA"), Title 45 U.S.C. §51 et seq. Petitioner sought damages for occupational injuries he sustained to his feet. (Sixth Circuit Joint Appendix, p. 7). Petitioner alleged that during the course of his employment with respondent he was required to walk on rock ballast which was large, oversized, loose, untamped, sloped or otherwise unsuitable for the assigned duties of a railroad conductor/brakeman. (Id., Apx., pgs. 9-11). Petitioner had worked for respondent since 1976. (Id., Apx. pg. 113).

Ballast, as defined by the American Railway Engineering Maintenance of Way Association ("AREMA"), is crushed and graded aggregate material which is placed upon railroad roadbed for purposes of track support and drainage. (Sixth Circuit Joint Appendix, pg. 220). AREMA has established certain recommendations for the size of ballast to be used along mainline track which include various sizes including ballast rock as large as 2 1/2 inches. (Id., pg. 289). Pursuant to AREMA recommendations, yard and industrial tracks are generally graded with ballast no larger than 1 inch and no smaller than 3/8 of an inch in order to provide improved walkway and safety conditions alongside those tracks. (Id.).

Petitioner's injury claim focused on the time period of 2002 until 2004 when he worked as a trainman in the Lansing, Michigan area. (Sixth Circuit Joint Appendix pgs. 143-144). Petitioner testified that most of the ballast he walked on in the Lansing area was too large, in that it was up to two inches in size, and not level. (Id., Apx. pgs. 135, 140-144).

Petitioner's job duties in Lansing primarily consisted of industrial switching of railroad cars at General Motors and other plants which required a significant amount of walking on railroad ballast. (Sixth Circuit Joint Appendix pg. 153). During his deposition petitioner identified nine specific tracks where the ballast conditions created unlevel and unsafe walking conditions. (Id., Apx. pg. 135). Petitioner testified that in the areas he was required to walk adjacent to the track, the ballast should have been leveled and covered with smaller stone, approximately 1/4 inch in size, to provide a more level and smooth walking surface. (Id., Apx. pg. 139). Petitioner testified that the walkway stone should have been placed down in an area adjacent to the track approximately two feet adjacent to the extended width of a box car. (Id., Apx. pg. 139). Without the use of smaller stone, the large loose ballast will cause an employees legs to shift while attempting to walk on it. (Id., Apx. pg. 141). Due to the large ballast and improper leveling and slope of the ballast, the walking conditions at Lansing were the worst petitioner has seen in his career while working for respondent. (Id., Apx. pg. 141). After returning to Lansing in approximately 2002 and walking on the ballast conditions in this area, petitioner's feet began to deteriorate resulting in surgery and ultimate disability. (Id., Apx. pg. 143).

Respondent's Motion for Summary Judgment did not contain any affidavits which suggested the walking conditions were reasonably safe or which, in any way, contradicted the affidavits presented by petitioner. In response to respondent's Motion for Summary Judgment, Plaintiff submitted the Affidavit of Dennis L. Pearson. (Sixth Circuit Joint Appendix, pg. 281). Mr. Pearson worked as a trainman for respondent from 1969 until 2005. (Id., Apx. pg. 282). Mr. Pearson attested that he was a former union officer and safety committee member who was familiar with petitioner's job duties and the areas where petitioner was required to walk while working in Lansing, Michigan. (Id., Apx. pgs. 281-282). In his affidavit, Mr. Pearson attested that during his years as a union officer, 2000 to 2005, one of the most frequent complaints he received from employees concerned the difficult walking conditions which employees encountered while walking along the tracks as they performed their job duties servicing industries in Lansing, Michigan. (Id., Apx. pgs. 282-283). The ballast used in the areas where employees walked to perform industrial switching consisted of large mainline ballast which could be as large as two inches in size. (Id., Apx. pg. 283). Walkway ballast is one inch or less in size. (Id., Apx. pg. 283). Over the years Mr. Pearson and other employees complained about these walking conditions to railroad management and requested that walkway ballast be placed down along the tracks in Lansing so that walking conditions would be improved and reasonably safe. (Id., Apx. pgs. 283-84). Mr. Pearson attested that walkway ballast in areas where trainmen frequently walked to perform their duties was the accepted safe practice throughout his career. (Id., Apx. pg. 283). Mr. Pearson further attested that he and other employees complained to railroad management

that the large ballast between the tracks where employees were required to walk be replaced with walkway ballast, so that a mostly level surface existed. (Id., Apx. pg. 284). This is done at other locations on the railroad and could have been done along the individual tracks where petitioner was required to walk. (Id., Apx. pg. 284).

David L. Mingus has been employed as a trainman for Defendant since 1968 and was the local chairman for the United Transportation Union, local chapter 734, until October 31, 2006. (Sixth Circuit Joint Appendix, pg. 286). Local 734 represents many members who work as trainmen in the Lansing, Michigan area. (Id., Apx. pg. 286). Members of Mr. Mingus' local chapter have worked switching jobs in the Lansing Yard along with jobs at Oldsmobile and other industrial sites which include working in and around tracks in the Lansing area. (Id., Apx. pg. 287). While servicing industries, trainmen are required to walk along these tracks on a daily basis and perform various switching activities. (Id., Apx. pg. 287). Much of the rock ballast along these tracks was mainline ballast which was as large as two inches in size. (Id., Apx. pg. 287). The size of the ballast along with the slope of the ballast made walking very difficult along these tracks. (Id., Apx. pg. 287).

Mr. Mingus has attested that he requested that management place walkway ballast, which is one inch or less in size, in the areas adjacent to these tracks where employees were required to walk. (Sixth Circuit Joint Appendix pg. 287). Mr. Mingus also requested that management make the walking areas level by filling in the areas between the rail tracks with walkway ballast. (Id., Apx. pg. 287). The safe practice

of using walkway ballast in areas where employees walk and work on a regular basis is utilized now and has been in the past at other locations on the Defendant's system. (Id., Apx. pg. 288).

PROCEEDINGS BELOW

Despite the above stated facts, the District Court granted respondent's Motion for Summary Judgment. (App. 24a). The District Court ruled that 49 U.S.C. §20106 of the Federal Railway Safety Act ("FRSA") precluded petitioner's FELA claim of negligence. The District Court reasoned that petitioner's negligence claims with respect to the size of ballast undermine the FRSA's express intent for national uniformity contained in 49 U.S.C. §20106 and concluded that respondent owed petitioner no duty separate from complying with the federal ballast requirements. In so ruling, the District Court held that 49 C.F.R. §213.103 comprehensively covered the subject and subsumed petitioner's ballast claim despite the fact that 49 C.F.R. §213.103 makes no reference about the size of ballast to be used to support the track structure of railroad track. Nor does 49 C.F.R. §213.103 address or concern the issue of what size ballast or other conditions constitute a reasonably safe walkway for trainmen performing their duties adjacent to the track.

On December 2007, the United States Court of Appeals for the Sixth Circuit issued an order consolidating the instant case with the Appeal styled: Donald C. Cooper v. CSX Transportation, Inc., Case No. 07-2437. The Cooper case also involved a FELA negligence claim concerning the use of large ballast.

On March 18, 2009, the United States Court of Appeals for the Sixth Circuit issued its decision affirming the District Court's decision in all respects. (App. 1a). In so ruling the majority opinion held that the FRSA, 49 U.S.C. §20106, can be used to preclude another federal law, the FELA, in the same manner as a state law, on the basis of the "uniformity demanded by the FRSA." (App. 7a - 8a). Thus, the court below precluded petitioner's FELA claim because it "would have been preempted if brought by a non-employer under state law." (App. 8A) In addition, relying on this Court's decision in CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993), the majority held that 49 C.F.R. §213.103 substantially subsumes the issue of ballast size and "determines what is a reasonable ballast composition and size for a particular track." (App. 11a).

In his dissenting opinion, Judge Rogers reasoned that the majority failed to distinguish between the regulatory interaction of the speed and crossing regulations present in Easterwood, as opposed to the limited scope of the ballast provisions in 49 C.F.R. §213.103. (App. 17a - 19a). Judge Rogers noted that 49 C.F.R. §213.103 exclusively concerns the requirements of the physical support for track structure and is totally silent with respect to the size of ballast and the ballast conditions of walkways directly adjacent to the track. Judge Rogers pointed out that unlike the detailed and interrelated speed and crossing provisions at play in Easterwood, 49 C.F.R. §213.103 has no corresponding provision designed to protect the safety of rail employees working adjacent to the track structure. Judge Rogers in his dissent states that Easterwood, "strongly suggests that the FRSA

regulation in this case does not preclude an FELA action." (App. 15a - 16a).

On May 22, 2009 the Sixth Circuit denied petitioner's Petition for Rehearing or Rehearing En Banc. (App. 34a).

REASONS FOR GRANTING THE WRIT

Since the passage of the FRSA in 1970, this Court has never reviewed a case which examines the interaction between the FRSA and the rail worker negligence law, the FELA. More importantly, in recent years, a few courts, like the court below, have relied upon a concern for "national uniformity" expressed in the FRSA to apply the state preemption standard contained in 49 U.S. C. §20106 of FRSA to preclude FELA injury claims.

The opinion below is inconsistent with provisions of the FRSA that state it was enacted to supplement existing law such as the FELA; and with the FRSA's directive that safety is its highest priority. Review is particularly important to rail workers covered exclusively by the FELA throughout the United States. This unjust result below should be reviewed and reversed.

I.

The Court Below Erroneously Applied The State Law Preemption Provisions Of 49 U.S.C. §20106 Of The FRSA To Preclude Petitioners Federal Claim Pursuant To The FELA

In 1970, Congress passed the Federal Railroad Safety Act, 49 U.S.C. §20101 et. seq., ("FRSA") for purposes of promoting rail safety and reducing rail accidents. Moreover, under the FRSA, Congress gave the Secretary of Transportation the authority to "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970." 49 U.S.C. §20103(a). The FELA and the federal common law decisions which accompany it were clearly established and "in effect on October 16, 1970." Nothing in the plain or implied language of the statute suggests that it was Congress' intent with the passage of the FRSA to impede or limit a railroad employees right to recover for on the job injuries pursuant to the FELA. Instead, what is clear from the FRSA's enabling provisions is that Congress intended to leave intact and undisturbed the FELA tort remedy which has been effectively redressing injuries inflicted upon railroad workers for the preceding 62 years. As a result, the Secretary of Transportation had no authority to preclude or undermine the FELA and the federal common law of rights and obligations under this statute.

The text of 49 U.S.C. §20106 references solely state laws and regulations. While it does include the statement that laws "shall be nationally uniform to the extent practible," there is nothing in the plain

language or the comments which mention or discuss any applicability to Federal law. A fair reading of this phrase simply indicates that state laws and regulations relating to railroads be uniform. Indeed, the previous title for 49 U.S.C. § 20106 was "National Uniformity of Laws." In 2007, this section was amended to add the subsections "(b) Clarification regarding State Law Causes of Action" and "(c) Jurisdiction." At the same time, Congress specifically retitled 49 U.S.C. §20106 to "Preemption." This change further clarifies and limits 49 U.S.C. §20106 to state law claims only.

The effect that any existing or new statute or regulation would have on a railroad's liability for personal injury or death under the FELA was considered by those involved in the FRSA's drafting process. To ensure that the FRSA was enacted as a compliment to the FELA, 208(d) of Pub.L 91- 458. Section 208(d) was included in order to make clear that the FRSA would have no preclusive effect upon the FELA. Instead, and quite to the contrary, Section 208(d) had the effect of enhancing an FRSA violation which caused injury to an employee to a negligence *per se* standard of responsibility on the part of the offending railroad, identical to the statutory scheme already existing under the Locomotive Inspection Act(now codified at 49 U.S.C.§ 20701), the Safety Appliance Acts(now codified at 49 U.S.C.§ 20302, et seq.), and the Hours of Service Act(now codified at 49 U.S.C.§ 21101, et seq.).

As originally enacted, section 208(d) of the FRSA provided:

> "All orders, rules, regulations, standards, and requirements in force, or prescribed or issued by the Secretary under this title, or by any State agency which is participating in investigative and surveillance activities pursuant to section 206 of this title, shall have the same force and effect as a statute for purposes of the application of sections 3 and 4 of the Act of April 22, 1908 (45 U.S.C. 53 and 54), relating to the liability of common carriers by railroad for injuries to their employees."

45 U.S.C. §53 provides:

> "In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. (emphasis added).

45 U.S.C. § 54 provides:

> In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. (emphasis added).

Taken together, Section 208(d) of the FRSA and 45 U.S.C. §§53 and 54 provide and were intended to make plain that a violation of the regulations issued by the FRA was not only actionable under the FELA, but actually enhanced the carrier's standard of responsibility.

In 1994 Congress codified the railroad transportation laws. (See, P.L. 103-272). The former section 208(d) of the FRSA was codified at 45 U.S.C. §54a, which now provides:

> A regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of title 49 or by a State agency that is participating in investigative and surveillance activities under section 20105 of

> title 49, is deemed to be a statute under sections 53 and 54 of this title.

In codifying the transportation laws, Congress made it clear that none of the changes were intended to be substantive. (See, Pub. L. 103-272, §1(a)(1994), and H.R. Rep. No. 103-180, 103d Cong., 1st Sess.l (1993).

The clear purpose of the amendment relating to the FELA (section 208(d) in the original act and §54a in the codification), was to address the issue of applicability of state and federal railroad safety laws and regulations to the FELA, to preserve for such violations which resulted in employee injury the FELA provisions relating to assumption of risk and contributory negligence, and to extend the negligence *per se* rule to such FRSA violations when invoked in FELA litigation. The FELA is intended to be in *pari materia* with the FRSA.

In accordance with 45 U.S.C. § 54a, any federal railroad safety regulation created by the Secretary of Transportation is deemed a safety statute for purposes of negligence *per se* under FELA. This principle has been consistently upheld by the various courts that have considered the issue since that time.

In City of Milwaukee v. Illinois, 451 U.S. 304 (1981) this Court explained that "the question whether a previously available common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem governed by federal common law." Id. at 315. In determining whether a federal statute supersedes previously established federal common law this Court

has reasoned that the relevant inquiry is "whether the statue '[speaks] directly to [the] question' otherwise answered by federal common law." County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 236-237, (1985). Here, the statute authorized only such laws and regulations which supplement the existing law and expressly displaced only those state laws described in Sec. 20106.

Moreover, in United States v. Texas 502 U.S. 529 (1993) this Court stated:

> "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." In such cases, Congress does not write upon a clean slate. In order to abrogate a common law principle, the statute must "speak directly" to the question addressed by the common law . . . [T]here is no support in our cases for the proposition that the presumption has no application to federal common law . . . "courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except 'when a statutory purpose to the contrary is evident.'"

Id. at 534 (citations omitted). The principles articulated in FELA appellate court decisions are merely extensions of the statutory remedy created by Congress for the benefit of railroad employees. Any fair reading of the FRSA clearly indicates that Congress did not intend by enactment of the FRSA, to abrogate or undermine the FELA plaintiff's ability to

state a FELA cause of action sounding in negligence. Thus, there is no "statutory purpose to the contrary."

This Court has consistently rejected attempts to abrogate rights pursuant to the FELA even where it is claimed that other federal statutes arguably take precedence. For example, in Atchison, Topeka and Santa Fe Ry. v. Buell, 480 U.S. 557 (1987), this Court held that the possibility of pursuing a labor grievance under the Railway Labor Act ("RLA") did not deprive an employee of his right to bring an FELA action. Although Buell had an available remedy under the RLA, this Court found it inconceivable that Congress intended a worker suffering from a disabling injury would be denied a recovery under the FELA simply because an overlap exists between the two Acts. Id. at 562. Since the RLA does not mention the FELA or deal with tort liability, it did not preclude an FELA claim. Id.

Moreover, this Court has recognized that a standard principle of statutory construction is that a later statute will not be held to have implicitly repealed an earlier statute unless there is a clear repugnancy between the two. United States v. Fausto, 484 U.S. 439 (1988). A simple lack of harmony between the two statutes will not suffice; when two statutes conflict to some degree they should be read together to give effect to each if that can be done without damage to their sense and purpose. Watt v. Alaska, 451 U.S. 259 (1981).

Indeed, this Court has recognized that the Federal Locomotive Inspection Act ("LIA"),[1] 49 U.S.C. § 20701 et seq. and the Federal Safety Appliance Act ("SAA"), 49 U.S.C. § 20301 serve to supplement the FELA and facilitate recovery under said statute. In Urie v. Thompson, 337 U.S. 163 (1946) this Court clarified how the LIA and the SAA compliment the FELA to facilitate, not restrict recovery for on the job injuries.[2] This Court described the interaction of these railroad safety statutes and stated:

> We do not think that Congress intended to act so inconsistently or that, by dispensing with the employee's burden of proving negligence in certain classes of Employers Liability Act suits, it had any purpose to withdraw from that Act's coverage any injury caused by employment which was covered by its terms. In the absence of any specific showing that Congress had in mind such a restrictive and inconsistent object, we are not free to create one by inference, more especially when it is derived from approaching the problem as if the Boiler Inspection and Safety Appliance Acts were wholly independent of and separate in design and purpose from the Employers' Liability Act

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[1] The LIA was previously known as the Boiler Inspection Act or BIA.

[2] See also, Southern Ry. Co. v. Bryan, 375 F.2d 155, 158 (5th Cir. 1967): "all of the federal laws [LIA, SAA] are in pari materia and must be liberally construed in connection with the federal remedy provided in" [FELA].

Id. at 190. In 1970 when Congress passed the FRSA, 49 U.S.C. § 20101 et seq., for the purpose of promoting rail safety and reducing rail accidents, nothing in the plain or implied language of the statute suggested that is was Congress' intent with the passage of the FRSA to impede or preclude the rights of railroad workers to seek compensation under the FELA. In short, in the absence of any specific language, it is inconceivable that Congress intended with the passage of the FRSA to impede a railroad worker's rights under the FELA.

This case permits this Court to clarify the interaction between the FRSA and the FELA. Contrary to the ruling of the court below, the FRSA should be read together with the FELA to promote worker safety rather than preclude recovery for on the job injuries. Clearly, there is not any repugnancy between the FRSA and the FELA. Indeed, other provisions of the FRSA incorporate substantially the FELA supporting statutes, the LIA and the SAA.[3] This case permits this Court to confirm its holding in Urie v. Thompson, supra, and clearly hold that the FRSA and the FELA should be read together to achieve the goals of railroad safety and the remedial objective of the FELA to compensate injured railroad workers.

There is simply no support in either the statutory language of the FRSA or the decisions of this Court for

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[3] See 49 C.F.R. § 229 - Railroad Locomotive Safety Standards; 49 C.F.R. §231 - Railroad Safety Appliance Standards; 49 C.F.R. § 215 - Freight Car Safety Standards; 49 C.F.R. § 232 - Brake System Safety Standards.

finding that § 20106 of the FRSA can be utilized to preclude a FELA claim.

Indeed this Court has rejected the notion that the FELA is similar or uniform with state common law principles.

In Sinkler v. Missouri Pacific R.R., 356 U.S. 326 (1958), this Court stated:

> [I]n interpreting the FELA, we need not depend upon common-law principles of liability. This statute, an avowed departure from the rules of common law, was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier."

In keeping with the dictates of Congress, the FELA is to be liberally construed on behalf of injured workers. Gallick v. Baltimore & Ohio R.R., 372 U.S. 108 (1963). Often the result is that recovery will be proper under the FELA when it would not be under the common law of negligence. Ignacic v. Penn Central Transp. Co., 291 Pa. Super. 431, 435, 436 A.2d 192, 194 (Sup. Ct. 1981) (citing Rodriguez v. Delray Connecting R.R., 473 F.2d 819 (6th Cir. 1973).

In order to further the FELA's humanitarian purposes, Congress did away with several common law tort defenses that might otherwise bar recovery by

injured workers. Traditional common law doctrines of assumption of risk and contributory negligence as a complete defense were significantly modified. Title 45 U.S.C. §54 bars the assumption of risk as a defense and Title 45 U.S.C. §53 substitutes the concept of comparative negligence.

In Crane v. Cedar Rapids & Iowa City Ry., 395 U.S. 164, 166 (1969), this Court was faced with the question of whether a state may make the defense of contributory negligence available to a railroad sued by a non-employee for personal injury damages caused by the railroad's violation of the Safety Appliance Act. In answering the question in the affirmative, this Court set out some of the statutory privileges enjoyed by the FELA plaintiff, in particular, the fact in a FELA cause of action, the railroad is deprived of the defenses of contributory negligence and assumption of risk. Id. at 166. Because the non-employee can only bring a common law action in tort, the availability of these defenses is left to state law. Id. This Court further stated:

> We recognize the injustice of denying recovery to a non-employee which would not be denied to an employee performing the same task in the same manner as did [the non-employee]. But it is for Congress to amend the statute to prevent such injustice. It is not permitted the court to rewrite the statute.

Id.

Contrary to the dictates of Crane, the court below has in effect rewritten the FELA. A FELA plaintiff's ability to recover against his employer is severely

undermined by the Sixth Circuit's decision to ignore the special treatment which a FELA plaintiff is entitled.

The decision below has failed to interpret the FRSA and the FELA together in order to give, whenever possible, the full effect to both federal statutes. That decision should be reversed.

II.

The Ruling Of The Court Below Unduly Emphasizes The Need For National Uniformity At The Expense of Railroad Safety

The FRSA was enacted in 1970 with clear directions from Congress that its purpose was "to promote safety in every area of railroad operations and reduce railroad related accidents and incidents." 49 U.S.C. §20101. In 2005, Congress again highlighted the importance of rail safety when it legislated the duties of the Federal Railroad Administration ("FRA"). 49 U.S.C. §103(c) provides:

> (c) Safety as highest priority. In carrying out its duties, the Administration shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement and dedication of Congress to the furtherance of the highest degree of safety in railroad transportation.

In establishing the FRA, as well as enacting the FRSA, Congress has mandated that safety is the "highest priority" of the law. Petitioner's theory of negligence, which is also consistent with the respondent's own

safety practices and the railroad industry safe practice regarding walkways, is the position which meets that "highest priority." The ruling of the court below that 49 U.S.C. § 20106 can be utilized to preclude another federal law, the FELA, unduly emphasized the need for national uniformity at the expense of railroad safety. Nothing in the text of the FRSA implies, let alone states, that 49 U.S.C. § 20106 applies to negligence claims brought under the FELA. Indeed, the decision below is contrary to the purpose of FRSA and its clear intent of Congress that safety is the "highest priority" in the railroad industry and contrary to this Court's precedent in FELA cases.

In cases brought solely under state law, this Court has found two areas, speed regulations and warning signs at grade crossings, where federal regulations pursuant to FRSA have "covered" the field such that any attempts at state regulation inconsistent with the federal regulations are preempted. Consequently, state negligence claims based on train speed and inadequate crossing warning devices were preempted by the FRSA where the railroad had complied with the regulations enacted by the Secretary of Transportation. CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993); and Norfolk Southern Railway Co. v. Shanklin, 529 U.S. 344 (2000).

The court below, as did the Seventh Circuit in Waymire v. Norfolk and Western Railway Co., 218 F.3d 773 (7th Cir. 2000) and the Fifth Circuit in Lane v. R.A. Sims Jr. Inc., 241 F.3d 439 (5th Cir. 2001), erroneously interpreted the Supreme Court's decisions in Easterwood and Shanklin as an invitation to apply state law preemption analysis to FELA claim's all in

the name of national uniformity. The court below cited approvingly to the holdings in Waymire and Lane and stated:

> We agree with this analysis. Although the court in Lane and Waymire addressed FELA claims of unsafe train speed in light of the FRSA speed - limit regulations, the FRSA's concern for uniformity leads us to reach the same conclusion regarding ballast regulations. And while railroads may face a lesser likelihood of state claims alleging negligent ballast composition, any exposure to conflicting standards undermines uniformity. See Norris v. C. of Ga RR. Co., 635 S.E.2d 179 (Ga. Ct. App. 2006). The plaintiff's claims are precluded by the FRSA if they would have been preempted if brought by a non-employee under state law. (App. 8a)

Significantly, subsequent to these decisions, this Court ruled in a very similar circumstance that a concern for uniformity is secondary to safety. In Sprietsma v. Mercury Marine, 537 U.S. 51 (2002), this Court considered the concern for national uniformity with respect to boating safety within the context of preemption. The statute involved was the Federal Boat Safety Act of 1971, ("FBSA"), codified at 46 U.S.C. §4301 et seq. Similar to the FRSA, the FBSA was enacted to promote safety. In its statement of purposes, the FBSA recites that it was enacted "to improve boating safety," to "authorize the establishment of national construction and performance standards for boats and associated equipment," and to encourage greater "uniformity of boating laws and regulations as among the several

States and the Federal Government." Pub. L. 92-75, §2, 85 Stat. 213-214.

At issue in Sprietsma was whether a common law negligence claim concerning the failure to provide propeller guards on a boat motor was preempted by the FBSA. This Court said the negligence claim was not preempted. In reaching this decision, this Court found that while Section 10 of the FBSA, 46 U.S.C. §4306, the statute's preemption clause, clearly preempted positive enactments, such as state or local laws or regulations, the statute did not expressly or implicitly preempt state law negligence claims. In addition, this Court recognized that despite the authority granted to the Coast Guard, the Coast Guard had never regulated propeller guards.[4] Finally this Court recognized that the FBSA's's goal of fostering uniformity in manufacturing regulations is an important but not an unyielding interest. This Court rejected the concept of placing national uniformity above safety issues and found that the propeller guard claim was not preempted by the FBSA. Is so ruling the Court stated:

> Absent a contrary decision by the Coast Guard, the concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families and serve the Act's more prominent objective, emphasized by its title, of promoting boating safety. Id. At p. 70.

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[4] Similarly, as will be more fully discussed in Section III below, the FRA has declined to regulate walkways adjacent to tracks.

This Court's ruling in Sprietsma, supra, is clearly applicable to the instant case. Just as in the FBSA, where this Court found there was no language which expressly or implicitly preempted a state law negligence claim, there is absolutely no language in the FRSA which in anyway suggests that a FELA claim is precluded by said statute. Indeed, Congressional emphasis on rail safety has been clearly and repeatedly stated. If anything, the emphasis on rail safety is more pronounced in FRSA. For instance, safety is the only purpose recognized in 49 U.S.C. §20101. In contrast, safety is the first of three separate objectives identified in the FBSA.

The decision below does not prioritize safety, but in fact, undermines rail safety. There is no dispute that respondent uses level, small ballast walkways at other locations. There is no dispute that employees have requested level walkways covered with small ballast to improve the safety of their working conditions and that these walkways are the recommended industry safety standards. Yet, the decision below permits the railroad to ignore a recognized safe practice and unjustly avoid any liability to its employees for its negligence.

This Court has confirmed that Congress anticipated that a federal common law of rights and obligations under the FELA would develop and would effectuate the FELA's remedial purpose. Kernan v. American Dredging Co. 335 U.S. 426, 432 (1958). The statute has worked well. For decades, juries throughout this country have made findings of fact as to the railroad's negligence with respect to the working conditions of railroad employees at various working locations throughout the country. Not only has the federal

common law which has developed under the FELA compensated railroad workers but it has improved worker safety.

If FELA and FRSA are to be read together to give full effect to both, whenever possible, then the decision below must be reversed. Petitioners negligence theory promotes safety and is compatible with the FRSA.

This case also permits this Court to clarify this issue of first impression and is of obvious and special importance to rail workers, their families and their employers, the nations' rail carriers. Since FRSA and FELA are both rail safety laws, this Courts review of the interaction between these laws will have significant impact on the many FELA cases pending in the courts of this country.

III.

This Court Should Resolve The Conflict Currently Present In The Legal Holdings Of The Fifth And Sixth Circuit Courts Of Appeal Compared To The Legal Holdings Of The Seventh And Ninth Circuit Courts Of Appeal As To Whether 49 C.F.R. §213.103 Covers The Subject Of Walkways Adjacent To Railroad Tracks To Preclude FELA Causes Of Action Based Upon Unsafe Walking Conditions

Assuming arguendo that 49 U.S.C. §20106 of the FRSA and state law preemption analysis can be utilized to preclude a claim under the FELA, the track safety standards codified at 49 C.F.R. §213, et seq., do not subsume or cover the subject matter of petitioner's negligence claims and, therefore, preclusion is

inappropriate. The instant case provides this Court with the opportunity to resolve the conflict present which currently pits the holdings of the Fifth and Sixth Circuit Courts of Appeals versus the Seventh and Ninth Circuit Courts of Appeal.

Similar to the decision of the court below to preclude petitioner's negligence claim with respect to the size of ballast in walking areas, the Fifth Circuit in Missouri P. R. Co. v. Railroad Comm. of Texas I, 833 F.2d 570, (5th Cir. 1987) and Missouri P. R. Co. v. Railroad Comm. of Texas II, 948 F.2d 179 (5th Cir. 1991) held that state walkway regulations which required smooth, maintained, properly sloped walkways along both sides of railroad tracks for employees working on or around railroad tracks were preempted by the provisions of 49 C.F.R. §213 et seq. In contrast the Seventh Circuit in the recent decision in Norfolk Southern Railway Co. v. Box, 556 F.3d 571 (7th Cir. 2009) and the Ninth Circuit in Southern Pac. Transp. Co. v. California Public Utilities Comm., 820 F.2d 1111 (9th Cir. 1987) have held that the rules of track construction and maintenance set forth in 49 C.F.R. §213, et seq. do not "cover" the subject of adjacent walkways to railroad tracks.[5]

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[5] Subpart B of the Track Safety Standards "prescribes minimum requirements for roadbed and areas immediately adjacent to roadbed." 49 C.F.R. §213.31. Subpart D, titled Track Structure, "prescribes minimum requirements for ballast, crossties, track assembly fittings, and the physical conditions of rails." 49 C.F.R. §213.101.

With respect to ballast, 49 C.F.R. §213.103 states as follows:

> Unless it is otherwise structurally supported, all tracks must be supported by material which will:
>
> a. Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
> b. Restrain the track laterally, longitudinally and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by rails;
> c. Provide adequate drainage for the track; and
> d. Maintain proper track cross-level, surface, and alignment.

Despite the fact that 49 C.F.R. §213.103 makes no reference whatsoever to the size of ballast to be used to support track structure or what constitutes a reasonably safe walkway for railroad employers performing their duties adjacent to the track, the court below found that said regulation covered the issue of ballast size and precluded petitioner's negligence claim that respondent failed to provide reasonably safe walking conditions adjacent to railroad tracks where petitioner was required to walk to perform his duties.

A. This Court Should Resolve The Conflict Between The Circuit Courts Of Appeals, Various Federal District Courts And State Courts On The Issue Of Whether 49 C.F.R. §213.103 Subsumes The Issue Of Ballast Size As It Pertains To Railroad Walkways.

The Sixth Circuit Court of Appeals in the instant case and the Fifth Circuit Court of Appeals in Missouri

P. R. Co. v. Railroad Comm. of Texas, I, supra and Missouri P. R. Co. v. Railroad Comm. of Texas, II, supra have ruled that as to the issue of ballast size and walkways adjacent to railroad tracks, 49 C.F.R. §213 et seq. cover the subject of walkways adjacent to railroad tracks. In contrast the Ninth Circuit in Southern Pac. Transp. Co. v. California Public Utilities Comm., supra and the Seventh Circuit in Norfolk Southern Railway Co. v. Box, supra have reached the opposite conclusion. In Box, the Seventh Circuit of Appeals held that 49 C.F.R. 213 et seq. did not "cover" and preempt the subject of walkways adjacent to rail tracks. In so ruling the court stated: "The rules for roadbed construction and maintenance do not "cover" the subject of adjacent walkways." (App. 50a). In Box the court of appeals affirmed the holdings of the district court which determined that the FRA had not adopted any regulations covering the subject matter of paths adjourning railroad tracks and that the Illinois statute requiring walkways did not conflict with any federal objective. (App. 47a). In so ruling the court of appeals pointed out the flaw in the railroad's position:

> The major problem with the railroad's position is that no federal regulation deals with walkways. Railroads are free to install them, or not, as they see fit. And if railroads may choose whether to have walkways, how then could it be said that there is a federal regulation that forbids states from acting?
>
> Norfolk Southern's answer is that federal regulations do specify how rail lines must be built. See 49 C.F.R. § 213.103. . . None of these rules deal with walkways, but Norfolk Southern maintains that they "cover" the subject because

> any walkway is bound to affect the slope of the ballast, its drainage properties or both. (App. 49a)

In 1976-7 the FRA was considering the issuance of a regulation covering walkways on bridges and trestles. FRA Docket No. RSB-1. The railroads opposed the issuing of the rule because of the wide variety of conditions that exists on railroads, including topography and weather. As a result, FRA decided against issuing a rule. In doing so it stated that:

> The issuance of a Federal standard for walkways might be counterproductive since it would generally preempt the States from carrying out their responsibilities under existing State laws except where an essentially local safety hazard could be identified.
>
> ....
>
> Finally, if an employee safety problem does exist because of the lack of walkways in a particular area or on a particular structure, regulation by a State agency that is in a better position to assess the local need is the more appropriate response.
>
> 42 F.R. 22181,22185, May 2, 1977.

While the rulemaking was directed to walkways on trestles and bridges, the analysis quoted above included all walkways.

The Seventh Circuit's decision that 49 C.F.R. §213 et seq. does not cover the subject of walkways was based in part on the fact that despite the opportunity,

the FRA has never exercised its jurisdiction to regulate walkways or employee safety in the areas immediately adjacent to railroad tracks.

Indeed, the well founded reasoning of the Seventh Circuit is consistent with a number of federal district courts and state courts which have held that 49 C.F.R. §213.103 does not subsume or cover the subject of safe walkways adjacent to railroad tracks with respect to FELA negligence claims. See Grimes v. Norfolk Southern. Railway. Co., 116 F. Supp. 2d 995 (N.D. Ind. 2000); Wilcox v. CSXT, No. 05-CV-107, 2007 U.S. Dist. LEXIS 39684 (N.D. Ind. May 30, 2007); Thomas v. BNSF Railway Co., No. 07-CV-310, 2008 U.S. Dist. LEXIS 94223 (N.D. Okla. Nov. 19, 2008); Davis v. Union Pacific Railroad Co., 598 F. Supp. 2d 955 (E.D. Ark. 2009); CSXT v. Miller, 858 A.2d 1025 (Md. Ct. Spec. App. 2004); Hendrix v. Port Terminal Railroad Assoc. 196 S.W.3d 188 (Tex. App. 2006) and Elston v. Union Pacific R.R. Co., 74 P.3d 478 (Col. Ct. App. 2003). In contrast, a number of Courts have followed the reasoning of the Court below and the Fifth Circuit Court of Appeals and found 49 C.F.R. §213.103 does subsume and cover the field in the subject of walkways and preclude a negligent walkway claim under the FELA. See Ferrra v. Canadian National/IC, No. 05-72721, 2007 U.S. Dist. LEXIS 88457 (E.D. Mich. May 4, 2007); Crabbe v. Consolidated Rail Corp, No. 06-12622, 2007 U.S. Dist. LEXIS 80895 (E. D. Mich. Nov. 1, 2007); Munns v. CSXT, No. 3:07CV2507, 2009 U.S. Dist. LEXIS 49555 (N.D. Ohio May 29, 2009) and Norris v. Central of Georgia Railroad Co., 635 SE.2d 179 (Ga. App. 2006).

The conflict between these courts needs to be resolved. Petitioner submits that the instant case

provides this Court with the opportunity to clarify that the provisions of 49 C.F.R. §213 et seq. concern a safe track for trains not a safe walkway. This case provides this Court with the opportunity to stop courts from using the FRSA and the corresponding provisions of 49 C.F.R. §213 et seq. as a basis to preclude long standing negligent walkway claims under FELA.

Petitioner's position and argument is well articulated in Grimes v. Norfolk Southern Railway Co., 116 F. Supp 2d 995 (N.D. Ind. 2000). In Grimes, a railroad employee was injured while walking on ballast inspecting a train which had just been in a collision. The ballast on which he walked was uneven, and contained a hole the size of a basketball. The defendant railroad moved to dismiss the plaintiff's case under the same "preclusion" theory as set forth in this case. The court rejected the railroad's "preclusion" argument, holding that the purposes of the FRSA and FELA were complimentary, not contradictory. Judge Sharp wrote:

> The Supreme Court has never ruled on the effect of FRSA on negligence claims under FELA, and the Circuits that have considered the issue are split. (Citation omitted.) The defendant NSRC has asked this Court to extend Waymire well beyond its holding to preclude a negligence claim under FELA for any conduct by the railroad even remotely covered by a regulation enacted under FRSA. This Court declines the invitation to do so. " Grimes, 116 F. Supp. 2d at 1003.

The decision of the court below significantly limits the ability of railroad workers to obtain injury

compensation pursuant to the FELA for unsafe working conditions within the Sixth Circuit as opposed to rail employees within the Seventh Circuit, who will benefit from increased walkway safety as well as the full sweep of Congressionally mandated rights pursuant to the FELA. This case provides this Court with the opportunity to resolve this conflict between the Circuit Courts of Appeals.

B. The Court Below Failed To Construe The Record Favorably To Petitioner, The Non-Moving Party, And Ignored Testimony Which Clearly Demonstrated That Petitioner Made A Walkway Claim Which Was Not Precluded By 49 C.F.R. §213.103.

The court below took a very narrow view of petitioner's ballast walking condition allegations in the complaint at law (App. 37a). The court below stated that petitioner failed in his complaint to specifically plead that the walkway areas which petitioner claimed were unsafe were separate and distinct from those areas of the roadbed "where track stability and support are concerned." The court below used this reasoning to distinguish the Seventh Circuit's holding in Norfolk Southern Railway Co. v. Box, 556 F.3d 571 (7th Cir. 2009) and found that the FRSA under 49 C.F.R. §213.103 precluded Petitioner's claim that respondent was negligent for failing to use ballast which was a suitable walking surface in those areas where trainmen were required to perform their duties.

The court below's reliance on petitioner's complaint runs contrary to the dictates of Fed. R. Civ. P. 8(a) which requires that a Complaint only contain "a short and plain statement of the claim showing that the

pleader is entitled to relief." Federal complaints plead claims rather than facts. Schmitz v. Canadian Pac. Ry. Co., 454 F.3d 678 (7th Cir. 2006). Moreover, a Complaint is only part of the entire record to be considered in a motion for summary judgment and the technical wording of a complaint in isolation is generally not a sufficient basis for granting summary judgment. Other materials, such as depositions, interrogatories, and affidavits must also be considered. Ross v. Corp of Mercer Univ., 506 F.Supp. 2d 1325, 1347 (M.D. Ga. 2007).

Petitioner respectfully submits that had the court below viewed the evidence properly it would have recognized that the walking area adjacent to the railroad tracks, which petitioner testified needed to be covered with smaller walkway ballast, is essentially the same area adjacent to the track which the Seventh Circuit determined was not covered by 49 C.F.R. §213 et seq. in Norfolk Southern Railway Co. v. Box, supra. In attempting to distinguish the Box decision on the basis of the allegations in petitioner's complaint, the court below ignored petitioner's deposition testimony wherein in response to specific questions posed by railroad counsel, he limited his ballast claim to those areas adjacent to the track where he was required to walk to perform his duties. Petitioner testified that the walkway area of small ballast he was describing should be adjacent to the railroad track, approximately two feet adjacent to the extended width of a box car. Similarly, Dennis L. Pearson attested that the large ballast should be replaced with smaller walkway ballast and the ground area between the railroad tracks be filled in with walkway ballast so that a mostly level surface existed. In addition, David L. Mingus attested that he had requested that

management make the walking areas along the tracks level by filling the areas between the rail tracks with walkway ballast.

Simply put, petitioner's negligence claim concerned the use of large ballast causing uneven and sloped areas in the walkways adjacent to track where employees were required to walk to perform their duties. The court below's characterization of petitioner's claim as limited to areas of the track "where stability and support are concerned" was nothing more than an attempt to avoid the Box decision. (App. 14a)

As Judge Rogers in his dissent correctly noted:

> This case then is no different from one in which a railroad worker brings an FELA suit for being injured by debris when the ballast is carelessly unloaded into place, or a FELA suit for injury from worker contact with a carcinogenic herbicide used to keep plants from growing on ballast. Nothing in the ballast-support regulations contemplates that there can categorically be no negligence with respect to a railroad's construction, maintenance or use of ballast. (App. 19a)

C. The Decision Of The Court Below Undermines A Traditional And Substantial Area Of Culpable Negligence Under The FELA

The impact of the decision by the court below is profound. The court below has taken a non specific regulation concerning track structure and ballast and

allowed the respondent to use it as a guise to immunize itself from liability in a traditional FELA negligence claim. As long as a railroad complies with 49 C.F.R. §213.103, they are free to ignore concerns of worker safety in walkway areas around railroad tracks, where employees are required to perform their duties. Whether they use marbles, crushed glass, or boulders to provide track support is now irrelevant. The regulation permits the use of "any material" as ballast. This is not the result Congress legislated.

The decision of the court below flies in the face of the humanitarian purpose of the FELA. A recent law review article is instructive. Federal Preemption and Preclusion: Why The Railroad Safety Act Should not Preclude The Federal Employers' Liability Act, 51 Loyola L. Rev. 947. This article discusses at length the harsh reality decisions such as the one in the instant case pose for railroad employees. The author comments:

> "The continued effect of FRSA preemption on federal FELA claims brought exclusively by railroad employees for on the job injuries runs the risk of creating substantial injustice. That bleak proposition seems reasonable when one follows the logic that the Secretary of Transportation, through FRSA preemption, could erode substantial areas of culpable negligence under the FELA action by promulgating standards and regulating areas that may form the basis of a valid FELA negligence claim. The unintended result would be that the only way for an injured railroad employee to recover from an on the job injury would be to prove a regulatory violation of an

> FRSA standard, thus turning the FELA civil action, which is firmly rooted in the theory of negligence, into a remedy conditioned upon only statutory violations."

Id. at *972.

The decision of the court below has placed the traditional concept of negligence on a slippery slope where the end result will cause railroad workers substantial injustice. This case provides this Court with opportunity to rectify the court below's narrow reading of the rights provided to railroad workers under the FELA. The concepts of negligence which have developed under the FELA have worked well to compensate railroad workers and improve railroad safety.

Unfortunately, the decision of the court below significantly limits the ability of rail workers to obtain just compensation for injuries sustained during the course of their employment as a result of unsafe walking conditions. The FELA is their only remedy at law. Most inconsistent, the rights of an injured employee working within the legal jurisdiction of the Sixth Circuit are different than an identically situated employee working within the legal jurisdiction of the Seventh Circuit. The employee working in Ohio is not afforded FELA protection from unsafe walking conditions, however, if he crossed state lines into Indiana, the full and intended Congressional rights as dictated by the FELA would be restored.

CONCLUSION

For all reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Sixth Circuit and, ultimately, to vacate and reverse the order below and remand the matter to the District Court for trial.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 07-1736/2437

[Filed March 18, 2009]

No. 07-1736

STANLEY R. NICKELS,
Plaintiff-Appellant,

v.

GRAND TRUNK WESTERN RAILROAD, INC.,
Defendant-Appellee.

No. 07-2437

DONALD C. COOPER,
Plaintiff-Appellant,

v.

CSX TRANSPORTATION, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. Nos. 06-11846; 05-73392—Robert H. Cleland, Paul D. Borman, District Judges.

Argued: July 31, 2008

Decided and Filed: March 18, 2009

Before: SILER, BATCHELDER, and ROGERS, Circuit Judges.

COUNSEL

ARGUED: Robert B. Thompson, HARRINGTON, THOMPSON, ACKER & HARRINGTON, Chicago, Illinois, Kirk E. Karamanian, O'BRYAN, BAUN, COHEN, KUEBLER & KARAMANIAN, Birmingham, Michigan, for Appellants. Andrew E. Tauber, MAYER BROWN, Washington, D.C., for Appellees. **ON BRIEF:** Robert B. Thompson, Laurence C. Acker, HARRINGTON, THOMPSON, ACKER & HARRINGTON, Chicago, Illinois, Kirk E. Karamanian, O'BRYAN, BAUN, COHEN, KUEBLER & KARAMANIAN, Birmingham, Michigan, for Appellants. Andrew E. Tauber, MAYER BROWN, Washington, D.C., Evan Mark Tager, MAYER BROWN, Chicago, Illinois, Richard A. Dietz, Michael J. Liddane, FOSTER, MEADOWS & BALLARD, Detroit, Michigan, James R. Carnes, ANSPACH MEEKS ELLENBERGER, Toledo, Ohio, for Appellees. James L. O'Connell, LINDHORST & DREIDAME CO., Cincinnati, Ohio, for Amicus Curiae.

BATCHELDER, J., delivered the opinion of the court, in which SILER, J., joined. ROGERS, J. (pp. 11-15), delivered a separate dissenting opinion.

OPINION

ALICE M. BATCHELDER, Circuit Judge. In this consolidated action, Stanley Nickels and Donald Cooper appeal entries of summary judgment on their Federal Employers' Liability Act ("FELA") claims. These former railway employees allege injuries caused by years of walking on oversized track ballast. The district courts below held that a Federal Railway Safety Act ("FRSA") regulation covers the issue of ballast size, precluding plaintiffs' negligence actions. We affirm.

I.

Nickels and Cooper both claim that their former employers failed to provide a safe working environment by using large mainline ballast — instead of smaller yard ballast — underneath and adjacent to tracks receiving heavy foot traffic. Track ballast is the stone or other material placed underneath and around railroad tracks to provide the structural support, drainage, and erosion protection necessary for safe rail travel. The two main sizes of track ballast are mainline ballast, which can be up to 2 inches in diameter, and yard ballast, which is typically 1 inch in diameter or smaller. The American Railway Engineering and Maintenance of Way Association

("AREMA")[1] recommends that railroads use yard ballast in areas where there is heavy foot traffic because walking on mainline ballast is more strenuous and provides for uneven footing.

Nickels began working for Grand Trunk in 1976. His job required him to walk on track ballast so that he could, among other things, conduct switching operations (move railcars from one track to another). Although most of this walking was done on yard ballast, a stint from 2002 to 2004 at Grand Trunk's Lansing, Michigan railyard required Nickels to walk on mainline ballast. In early 2004 Nickels began experiencing pain and discomfort in his feet, especially his big toes. Ultimately, Nickels had to have surgery on both feet — his left foot in January 2005, and his right foot in April 2005. Nickels unsuccessfully attempted to return to work and has been on permanent restriction since October 2005.

Cooper began working for CSX in 1967. His duties required him to walk on mainline ballast. In 2000, Cooper sought treatment for stiffness and pain in his right leg, from his hip down to his toes. By February 2003, Cooper was no longer able to perform his job responsibilities. He eventually was diagnosed with avascular necrosis, "a cellular death of bone components due to interruption of the blood supply . . . resulting in bone destruction, pain, and loss of joint function."

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[1] AREMA is an engineering support association whose mission is the development and advancement of both technical and practical knowledge and recommended practices pertaining to the design, construction, and maintenance of railway infrastructure. AREMA standards are merely recommendations and are non-binding.

Nickels and Cooper separately sued their former employers under the FELA, 45 U.S.C. § 51, *et seq*. The railroads moved for summary judgment, arguing that the FRSA, 49 U.S.C. § 20101, *et seq*., precluded the plaintiffs' FELA claims. The district courts granted the motions, concluding that allowing the plaintiffs to advance their FELA claims would undermine the FRSA's express intent to achieve national uniformity in railroad safety regulations.[2] Nickels and Cooper timely appealed, and we consolidated their actions to consider the preclusion issue common to both suits.

II.

We review de novo a district court's grant of summary judgment, using the same standard applied by the district court. *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (en banc). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We must review all the evidence, facts, and inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Whether a federal law preempts a state law or precludes another federal law is a question of law which we review de novo. *See Nye v. CSX Transp., Inc.*, 437 F.3d

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[2] In Cooper's case, the district court alternatively held that Cooper's claim was barred by the statute of limitations because he filed suit more than three years after knowing the likely cause of his injury. Because Cooper's claim is precluded by the FRSA, we do not reach that issue.

556, 560 (6th Cir. 2006) (citing *Shanklin v. Norfolk S. Ry. Co.*, 369 F.3d 978, 985 (6th Cir. 2004) (overruled on other grounds)).

III.

This case requires us to examine the interplay of two federal statutes, both of which were designed to promote railway safety. The FELA makes a railroad liable to its employees injured "by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U.S.C. § 51. The statute provides a "cause of action sounding in negligence[.] . . . Absent express language to the contrary, the elements of a FELA claim are determined by reference to the common law." *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 165-66 (2007).

The FRSA's purpose is "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 347 (2000) (quoting 49 U.S.C. § 20101). The FRSA authorizes the Secretary of Transportation ("Secretary") to "prescribe regulations and issue orders for every area of railroad safety." *Id.* (quoting 49 U.S.C. § 20103(a)). Under the FRSA's express preemption provision,"[l]aws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). "A State may adopt or continue in force a law, regulation, or order related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2). A state-law negligence action is

"covered" and therefore preempted if a FRSA regulation "substantially subsume[s]" the subject matter of the suit. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). This provision explicitly preempts only State laws, regulations, and orders; it does not mention other federal safety standards.

We must consider: (1) whether a FELA claim is precluded if the same claim would be preempted by the FRSA if brought as a state-law negligence action; and (2) if so, whether the subject of these plaintiffs' claims has been covered by a FRSA regulation. We answer both questions in the affirmative.

A.

Two of our sister circuits have held that the uniformity demanded by the FRSA "can be achieved only if [federal rail safety regulations] are applied similarly to a FELA plaintiff's negligence claim and a non-railroad-employee plaintiff's state law negligence claim."[3] *Lane v. R.A. Sims, Jr., Inc.*, 241 F.3d 439, 443

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[3] Other courts also have reached this conclusion. *See, e.g., Dickerson v. Staten Trucking, Inc.*, 428 F. Supp. 2d 909, 913-14 (E.D. Ark. 2006); *Major v. CSX Transp., Inc.*, 278 F. Supp. 2d 597, 608-10 (D. Md. 2003); *In re Amtrak "Sunset Ltd." Train Crash*, 188 F. Supp. 2d 1341, 1349 (S.D. Ala. 2000); *Rice v. Cincinnati, New Orleans & Pac. Ry. Co.*, 955 F. Supp. 739, 740-41 (E.D. Ky. 1997); *Thirkill v. J.B. Hunt Transp., Inc.*, 950 F. Supp. 1105, 1107 (N.D. Ala. 1996); *Norris v. C. of Ga. R.R. Co.*, 635 S.E.2d 179, 182-83 (Ga. Ct. App. 2006); *CSX Transp., Inc. v. Miller*, 858 A.2d 1025, 1047-49 (Md. Ct. Spec. App. 2004); *Elston v. Union Pac. R.R. Co.*, 74 P.3d 478, 486-88 (Colo. Ct. App. 2003); *Key v. Norfolk S. Ry. Co.*, 491 S.E.2d 511, 513-14 (Ga. Ct. App. 1997). *But see Grimes v. Norfolk S. Ry. Co.*, 116 F. Supp. 2d 995, 1002-03 (N.D. Ind. 2000);

(5th Cir. 2001); *see also Waymire v. Norfolk & W. Ry. Co.*, 218 F.3d 773, 776 (7th Cir. 2000).

> Dissimilar treatment of the claims would have the untenable result of making the railroad safety regulations established under the FRSA virtually meaningless: "The railroad could at one time be in compliance with federal railroad safety standards with respect to certain classes of plaintiffs yet be found negligent under the FELA with respect to other classes of plaintiffs for the very same conduct."

Id. (quoting *Waymire v. Norfolk & W. Ry. Co.*, 65 F. Supp. 2d 951, 955 (S.D. Ind. 1999), *aff'd*, 218 F.3d 773 (7th Cir.2000)).

We agree with this analysis. Although the courts in *Lane* and *Waymire* addressed FELA claims of unsafe train speed in light of FRSA speed-limit regulations, the FRSA's concern for uniformity leads us to reach the same conclusion regarding ballast regulations. And while railroads may face a lesser likelihood of state-law claims alleging negligent ballast composition, any exposure to conflicting standards undermines uniformity. *See Norris v. C. of Ga. R.R. Co.*, 635 S.E.2d 179, 183 (Ga. Ct. App. 2006). The plaintiffs' claims are precluded by the FRSA if they would have been preempted if brought by a non-employee under state law.

Earwood v. Norfolk S. Ry. Co., 845 F. Supp. 880, 889-91 (N.D. Ga. 1993).

B.

Under the FRSA's preemption provision, a plaintiff can bring an action under state law unless the Secretary has prescribed a regulation or issued an order "covering the subject matter of the State requirement." 49 U.S.C. § 20106. The Secretary has promulgated a regulation on ballast:

> Unless it is otherwise structurally supported, all track shall be supported by material which will —
>
> (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
>
> (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;
>
> (c) Provide adequate drainage for the track; and
>
> (d) Maintain proper track crosslevel, surface, and alignement.

49 C.F.R. § 213.103. The question is whether this regulation covers the subject matter of the plaintiffs' claims.

The gist of these claims is that the railroads used large mainline ballast in areas where smaller yard ballast would have sufficed — such as passing sidings, switch leads, and interior yard tracks. The regulation, however, makes no distinction between mainline and secondary track; it provides that "*all* track shall be

supported by material" able to transmit and distribute track and equipment loads, restrain the track under dynamic loads and thermal stress, provide adequate drainage, and maintain proper track crosslevel, surface, and alinement. *Id.* (emphasis added). Rather than prescribing ballast sizes for certain types or classes of track, the regulation leaves the matter to the railroads' discretion so long as the ballast performs the enumerated support functions. In this way, the regulation substantially subsumes the issue of ballast size.

In *Easterwood*, the Supreme Court held that a federal regulation limiting train speed to 60 miles per hour for a particular class of grade crossings preempted a state tort claim that a train operating under the speed limit was nonetheless going unreasonably fast. 507 U.S. at 673-75. The Court explained:

> On their face, the provisions of § 213.9(a) address only the maximum speeds at which trains are permitted to travel given the nature of the track on which they operate. Nevertheless, related safety regulations adopted by the Secretary reveal that the limits were adopted only after the hazards posed by track conditions were taken into account. Understood in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation of the sort that respondent seeks to impose on petitioner.

Id. at 674. The Court noted that because automobile driver conduct is "the major variable in grade crossing accidents," the Secretary of Transportation relied heavily on the type of warning signals and other safety devices present at a class of grade crossings to determine the appropriate speed limit for that class. *Id.* at 674-75. "Read against this background," the Court concluded, "§ 213.9(a) should be understood as covering the subject matter of train speed *with respect to track conditions, including the conditions posed by grade crossings.*" *Id.* at 675 (emphasis added). In other words, the Secretary had already determined what was a reasonable speed for that class of grade crossings.

Likewise, in § 213.103 the Secretary has directed railroads to install ballast sufficient to perform key support functions under the conditions applicable to the track. Although these conditions necessarily are track-specific and are not classified as were the grade crossings in *Easterwood*, they effectively narrow the universe of material the railroad may use in a given situation. The regulation thus determines what is a reasonable ballast composition and size for a particular track.

The plaintiffs argue that their theory of recovery "is obviously consistent and compatible with [the railroads'] obligations under the FRSA ballast regulations." This is so, they contend, because the railroads could have used smaller ballast in areas of heavy foot traffic without violating their duty to provide a stable track. Even if this proposition is true, the fact that track stability and safe footing are not mutually exclusive does not mean that § 213.103 has not covered the subject of ballast size. Preclusion and

preemption under the FRSA are not limited to situations where the federal or state standard is incompatible with a regulation. If they were, there would be no need for the second savings clause of 49 U.S.C. § 20106(a)(2), under which "a State may . . . continue in force *an additional or more stringent* law . . . related to railroad safety . . . when the law . . . *is not incompatible* with a law, regulation, or order of the United States Government . . . ." (Emphasis added).

The plaintiffs nonetheless argue that Congress has amended the FRSA's preemption provision to require "incompatibility" as a "second test" for preemption. In 2007 Congress added a new subsection to 49 U.S.C. § 20106, which provides in part:

> Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party . . . has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

49 U.S.C. § 20106(b)(1). This subsection does not impose an incompatibility requirement for preemption or preclusion. In referencing § 20106(a)(2), it clarifies that a state may adopt or continue in force "a law, regulation, or order related to railroad safety" — including a state cause of action for "damages for personal injury, death, or property damage" — so long as the requirements of § 20106(a)(2) are satisfied.[4]

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[4] That subsection provides in full:

> (2) A State may adopt or continue in force a law,

Under § 20106(a)(2), once the Secretary has issued a regulation covering the subject matter of a state law, regulation, or order related to railroad safety, that state law, regulation, or order is preempted unless it is necessary to address an essentially local safety hazard, is not incompatible with the federal regulation, and does not unreasonably burden interstate commerce. In other words, under both §§ 20106(a)(2) and (b)(1), incompatibility is a prerequisite — not for preemption or preclusion, but for application of the savings clause.

The plaintiffs note that 49 C.F.R. § 213.103 does not address "what constitutes a reasonably safe walkway for railroad employees performing their

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regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order —

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106(a)(2).

duties adjacent to the track."[5] This suggests that the plaintiffs allege negligence in the railroads' use of oversized ballast in areas completely separate from those where track stability and support are concerned. Such an allegation, however, does not appear in either of their complaints. Nickels alleges that "railroad 'ballast' was used by the defendant *to support the railroad track* structures owned, maintained and used by the defendant in areas where the plaintiff was required to perform his assigned duties." (emphasis added). In his complaint, Cooper simply alleges that "Defendant did provide Plaintiff with an unsafe place to work by requiring ambulation on unsuitable ballast and driving trucks there over along with other uneven conditions, resulting in injury." But in his response to CSX Transportation's motion for summary judgment, Cooper admits that "[t]he purpose of ballast is to provide support and adequate drainage to the track structure," and suggests that smaller ballast would have been appropriate "along the main tracks, ladder tracks, and switching leads," "as an overlay or along a berm or shoulder running parallel to mainline tracks," and "as fill in between tracks as well as on the outside of tracks where employees are expected to work." *Id.* at 155. Even to the extent that the plaintiffs argue oversized ballast was used "along," "adjacent to," or "parallel to" the track, they do not contend that the

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[5] *See also Norfolk S. Ry. Co. v. Box*, ___ F.3d ___, No. 08-1116, 2009 WL 322151, at *3 (7th Cir. 2009) ("[T]he safety of workers on walkways . . . is distinct from questions about stability and drainage of tracks."); *Grimes v. Norfolk S. Ry. Co.*, 116 F. Supp. 2d 995, 1002-03 (N.D. Ind. 2000) (§ 213.103 does not address employee walkways); *Earwood v. Norfolk S. Ry. Co.*, 845 F. Supp. 880, 891 (N.D. Ga. 1993) (same); *CSX Transp., Inc. v. Miller*, 858 A.2d 1025, 1050-52 (Md. Ct. Spec. App. 2004) (same).

ballast in those areas was not being used for stability under § 213.103.

IV.

Because 49 C.F.R. § 213.103 covers the issue of ballast size and precludes the plaintiffs' FELA claims, we **AFFIRM** the grants of summary judgment to the railroads.

DISSENT

ROGERS, Circuit Judge, dissenting. The plaintiffs' FELA claims are not categorically precluded by the FRSA in this case. Like the majority, I agree with the well-reasoned holdings from other jurisdictions that a railway-safety claim that would be preempted by the FRSA if brought by a nonemployee under state tort law, would necessarily be precluded by the FRSA if brought by a railroad employee under the FELA. *See Lane v. R.A. Sims, Jr., Inc.*, 241 F.3d 439, 443-44 (5th Cir. 2001); *Waymire v. Norfolk & W. Ry. Co.*, 218 F.3d 773, 775-76 (7th Cir. 2000). However, under the Supreme Court's FRSA federal preemption analysis, the FRSA regulations that require adequate physical support for rails do not sufficiently imply that railroads may use any grade of sufficiently supportive ballast, no matter the risk to employees who must walk on the ballast. I therefore respectfully dissent.

The Supreme Court's analysis in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), the seminal FRSA preemption case, strongly suggests that the FRSA regulation in this case does

not preclude an FELA action. The regulation, while putting requirements on railroads regarding adequate physical support for trains, in no way implies that such physical support may be obtained without regard to harms to workers from the roughness of the walking surface of the ballast. This is in direct contrast with the situation in *Easterwood*, where the Supreme Court relied on just such an implication.

Nothing in 49 C.F.R. § 213.103 or any related regulations addresses the issue of trackside walkways and ballast size. The regulations generally require adequate support for the trains, and advert in no way to the nature of a walking surface. Section 213.103 provides as follows:

> Unless it is otherwise structurally supported, all track shall be supported by material which will –
>
> (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
>
> (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;
>
> (c) Provide adequate drainage for the track; and
>
> (d) Maintain proper track crosslevel, surface, and alinement.

Sections 213.33 and 213.37 then address roadbed drainage and trackside vegetation. Further regulations set forth highly technical requirements for track geometry. *See* §§ 213.57 (curves; elevations and speed limitations), 213.63 (track surface), 213.55 (alinement). All of these provisions are primarily concerned with providing a stable track and roadbed.[1] The provisions are essentially silent with respect to conditions of the walkways directly adjacent to the track.[2]

Plaintiffs point to nothing in the regulation implicitly permitting the railroad to use whatever size ballast it wants as long as there is adequate support. This is in direct contrast with what the Supreme Court relied upon in *Easterwood*. In that case the Supreme Court held that a state tort action for wrongful death, to the extent that it was based on a train's traveling at excessive speed, was preempted by FRSA train-speed regulations. *Easterwood*, 507 U.S. at 676. The regulations relied upon by the railroad limited the

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[1] This is not to suggest that § 213.103 is not concerned with employee safety. The FRA adopts all regulations with the objective of "protecting persons along the right-of-way and railroad employees" in mind. 43 Fed. Reg. 10,583, 10,585 (Mar. 14, 1978); *see also Lane*, 241 F.3d at 444 ("Railroad operations *cannot* be conducted *without* railroad employees; therefore, it seems obvious that railroad employee safety is one of the 'area[s] of railroad operations' addressed by the statute and regulations." (quoting 49 U.S.C. § 20101)). By preventing train derailments, the FRA is making for much safer employee conditions.

[2] The only provision that hints at concern with walkways is § 213.37(c), which requires that vegetation on or immediately adjacent to the roadbed be controlled so that it does not "[i]nterfere with railroad employees performing normal trackside duties."

train's speed to 60 m.p.h. for the class-four crossing at which the collision with the decedent's truck took place. *Id.* at 673. The Supreme Court did *not* simply say that because the defendant's train was going under the speed limit, and because the claim was for excessive speed, the claim was preempted. Instead, the Court was at pains to infer that the speed limit was not only a prohibition on going over 60 m.p.h., but also a permission to go up to 60 m.p.h. "Understood in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation of the sort that respondent seeks to impose on petitioner." *Id.* at 674. The Court came to this conclusion by the following reasoning:

> Because the conduct of the automobile driver is the major variable in grade crossing accidents, and because trains offer far fewer opportunities for regulatory control, the safety regulations established by the Secretary concentrate on providing clear and accurate warnings of the approach of oncoming trains to drivers. Accordingly, the Secretary's regulations focus on providing appropriate warnings given variations in train speed. [The Supreme Court here provided several examples in support.]
>
> Read against this background, [the FRSA speed limit regulation] should be understood as covering the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings.

Id. In other words, the focus in the regulations on grade crossing warnings implied that trains could freely proceed at a speed up to the regulatory limit.

Imposing a lower limit would interfere with that regulatory balance.

In contrast, the regulation here cannot be viewed as giving defendants permission to comply in any manner they desire. No interrelation between physical support for trains and the surface of walkways has been identified in the regulatory scheme in this case. Whereas in *Easterwood* the Court found in effect that the regulatory scheme demanded that safety from crossway collisions come primarily from signals rather than slow speed, there is no basis for us to read that adequate physical support for trains and safe walkways for workers are interests that have been counterbalanced to permit the use of any grade of surface ballast on walkways.

This case then is no different from one in which a railroad worker brings an FELA suit for being injured by debris when ballast is carelessly unloaded into place, or an FELA suit for injury from worker contact with a carcinogenic herbicide used to keep plants from growing on ballast. Nothing in the ballast-support regulations contemplates that there can categorically be no negligence with respect to a railroad's construction or maintenance of ballast.

A number of courts have accordingly held that FRSA regulations do not preclude FELA suits based on ballast walkways. *See Wilcox v. CSX Transp., Inc.*, No. 1:05-CV-107, 2007 WL 1576708 (N.D. Ind. May 30, 2007); *Grimes v. Norfolk S. Ry. Co.*, 116 F. Supp.2d 995 (N.D. Ind. 2000); *Elston v. Union Pac. R.R. Co.*, 74

P.3d 478 (Colo. Ct. App. 2003);[3] *see also S. Pac. Transp. Co. v. Pub. Utils. Comm'n*, 647 F. Supp. 1220 (N.D. Cal. 1986), *aff'd per curiam*, 820 F.2d 1111 (9th Cir. 1987).

This of course is not to say that a jury may require an action that violates the FRSA regulation. If, for instance, a successful FELA claim effectively created "a walkway requirement or other safety regulation that hindered or prevented a railroad from complying simultaneously with an FRA regulation designed to enhance safety in a different area," *Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 833 F.2d 570, 574 (5th Cir. 1987), FELA relief would clearly be precluded on that ground. A jury verdict for the plaintiff cannot impose "'different or higher standards' of track construction by superimposing the walkway requirement on federal track . . . structure regulations." *See id.* at 575. In that instance, the railroad could not comply both with the judgment against it on the FELA claim and with the FRSA regulation.

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[3] I recognize that *Norris v. Central of Georgia Railroad Co.*, 635 S.E.2d 179 (Ga. Ct. App. 2006), is to the contrary, and that some non-FELA cases have reasoning that is in some tension with this analysis. *See Norfolk & W. Ry. Co. v. Burns*, 587 F.Supp. 161, 170 (E.D. Mich. 1984) (concluding that walkways are a part of track structure and thus immune from additional state regulation); *Black v. Seaboard Sys. R.R.*, 487 N.E.2d 468, 469 (Ind. Ct. App. 1986) (concluding that walkways are a part of track structure and thus covered by FRSA regulations); *Black v. Balt. & Ohio R.R. Co.*, 398 N.E.2d 1361, 1363 (Ind. Ct. App. 1980) (deciding that the regulations, "although not specifically dealing with" muddy walkways, regulated the entire track structure).

But nothing like that has yet been shown by defendants in this case. Unlike the regulation at issue in *Easterwood*, the FRSA regulation is a floor that guarantees a minimum level of safety and there are many ways that the railroad can meet the standard. The manner in which the railroad complies with the standard may involve using ballast that is more or less conducive to creating safe walkways for railroad employees. While compliance with the FRSA regulation is evidence of due care, it "does *not* preclude finding negligence if *reasonable* railroads would have taken additional precautions to prevent injury to their employees." *Lane*, 241 F.3d at 442.

Because defendants have not shown that the regulation would preempt state actions under *Easterwood*'s standard, it similarly does not preclude FELA relief.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 07-1736/2437

[Filed March 18, 2009]

No. 07-1736

STANLEY R. NICKELS,
Plaintiff-Appellant,

v.

GRAND TRUNK WESTERN RAILROAD, INC.,
Defendant-Appellee.

No. 07-2437

DONALD C. COOPER,
Plaintiff-Appellant,

v.

CSX TRANSPORTATION, INC.,
Defendant-Appellee.

Before: SILER, BATCHELDER, and ROGERS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district courts' grants of summary judgment to the defendant railroads are AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 06-CV-11846-DT

[Filed May 30, 2007]

STANLEY R. NICKELS, Plaintiff, v. GRAND TRUNK WESTERN RAILROAD, INC., and CANADIAN NATIONAL/ILLINOIS CENTRAL, Defendants.	)

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pending before the court is a motion for summary judgment, filed by Defendants Grand Trunk Western Railroad, Inc. and Canadian National/Illinois Central on March 30, 2007. The matter has been fully briefed and the court concludes a hearing on the motion is unnecessary. *See* E.D. Mich. LR 7.1(e)(2). For the reasons stated below, the court will grant the motion.

I. BACKGROUND

Plaintiff Stanley R. Nickels worked for Defendants from 1976 to 2004 as a switchman or conductor. (Pl.'s Dep. at 46-48, 61-62, Defs.' Ex. B.) He worked in Flint, Pontiac and Lansing, Michigan at various times, with his time in Lansing from 2002 to 2004 as the most relevant period for purposes of this case. (*Id.*) His job duties required him to walk along tracks and, specifically, upon ballast, which is loose stone along a track that serves mainly structural purposes for the track. (*Id.* at 97-98.) Plaintiff's arthritic toe condition required surgery in 2004, which caused him to leave work on medical disability. (*Id.* at 48.) Plaintiff identified several areas in Lansing where the "bad ballast" was located, which included mainline railroad track. (*Id.* at 98-101, 108-09.) Plaintiff alleges that the ballast where he worked in Lansing was too large -- up to two inches in size -- and not level. (*Id.* at 119-122.) Plaintiff's complaint advances the theory that Defendants were negligent for providing an unsafe work environment to him, because the size and instability of the ballast created a foreseeable risk of injury to Plaintiff. (Compl. at ¶¶ 12-24.) Plaintiff advances his cause of action under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.* (*Id.* at ¶¶ 19-20, 23-24.)

Defendants' motion for summary judgment argues that the composition of its ballast was regulated by the requirements of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20101, plus the regulations of the Federal Railroad Administration ("FRA") and Department of Transportation ("DOT"), compliance with which precludes Plaintiff's FELA claim. (Defs.' Br. at 14-21.) Plaintiff responds that his FELA claim

is not precluded and that there is at least a material question of fact concerning whether Defendants were negligent for failing to provide him with a safe work environment. (Pl.'s Br. at 19-30.)

II. STANDARD

Under Federal Rule of Civil Procedure 56, summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "Where the moving party has carried its burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record construed favorably to the non-moving party, do not raise a genuine issue of material fact for trial, entry of summary judgment is appropriate." *Gutierrez v. Lynch*, 826 F.2d 1534, 1536 (6th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

Summary judgment is not appropriate when "the evidence presents a sufficient disagreement to require submission to a jury." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The existence of some factual dispute, however, does not defeat a properly supported motion for summary judgment; the disputed factual issue must be material. *See id.* at 252 ("The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict-'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.'").

III. DISCUSSION

To prevail on his FELA claim, Plaintiff must "prove the traditional common law elements of negligence: duty, breach, foreseeability, and causation." *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539 (6th Cir. 1990) (quotation omitted). Defendants essentially argue that they owed Plaintiff no duty beyond complying with the FRSA, because the national interest in railroad safety standards should not give way to varying determinations, generally by juries, about the condition of railroad ballast in specific cases. The FRSA explicitly states the uniformity interest. "Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. The statute authorizes the Secretary of Transportation to prescribe such regulations and orders. 49 U.S.C. §§ 20101, 20103(a).

FRSA also preempts state law, 49 U.S.C. § 20106, and the United States Supreme Court has interpreted the preemption provision to mean that "the federal regulation must cover the same subject matter and not merely touch upon or relate to that subject matter . . . pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344, 352 (2000) (quotations omitted); *see also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Similarly, the FRSA has preclusive effect vis-a-vis other federal statutes. *See e.g., Waymire v. Norfolk and Western Ry. Co.*, 218 F.3d 773, 775 (7th Cir. 2000) (holding that FRSA precludes a FELA claim alleging excessive train speed and

inadequate warning devices); *Lane v. R.A. Sims, Jr., Inc.*, 241 F.3d 439 (5th Cir. 2001) (excessive speed).

The Secretary of Transportation has promulgated rules regarding track ballast, 49 C.F.R. § 213.103, and the question before this court is whether those regulations preclude Plaintiff's FELA claim. The federal regulations state that:

> [u]nless it is otherwise structurally supported, all track shall be supported by material which will -
> (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
> (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;
> (c) Provide adequate drainage for the track; and
> (d) Maintain proper track crosslevel, surface

49 C.F.R. § 213.103. Plaintiff's complaint and his deposition testimony, fairly understood, do not allege that Defendants failed to comply with the above regulations. There is no allegation that the ballast upon which he worked failed to, for instance, adequately support the railroad rolling equipment, provide adequate drainage, etc. Rather, Plaintiff appears to argue that the above regulations address railroad safety but not railroad worker safety. Implicitly, Plaintiff asserts that FELA imposes an additional duty on Defendants beyond meeting the ballast requirements promulgated pursuant to FRSA. Because accepting this view of FELA will undermine FRSA's express interest in national uniformity, the court concludes that Defendants owed Plaintiff no duty

separate from complying with the federal ballast requirements.

The ballast requirements substantially subsume the subject matter of Plaintiff's theory of recovery. While the regulations offer no specific metric for the size, mixture or looseness of the ballast, they do ordain particular purposes that the ballast must serve. As a consequence, the regulations mandate a limited universe of material that is suitable for the listed purposes. In the same way that federal speed regulations set uniform national ceilings that a FELA claim of negligence cannot alter, *see Waymire*, 218 F.3d 773; *Lane*, 241 F.3d 439, the ballast regulations set a base level that a FELA claim may not augment. *See also Norfolk & Western Ry. Co. v. Public Utilities Com'n of Ohio*, 926 F.2d 567, 571-72 (6th Cir. 1991) (holding that the FRSA's explicit refusal to adopt a regulation requiring bridge walkways amounted to a negative preemption of Ohio regulation concerning walkways on railway bridges and trestles). The purpose of a uniform national standard would be disregarded and its practical effect lost if individual FELA claims could create a hodgepodge of differing standards in disparate locales, each such "standard" being attuned by the verdict of a separate jury to the peculiar circumstances of one railroad worker's physical characteristics and his reaction to the otherwise-compliant ballast found at that locale.

The potential for eradicating national uniformity through patchwork litigation is manifest in this district court's docket. Another plaintiff recently filed a claim against the same Defendants, alleging that his degenerative knee condition was the effect of years of work he did in Pontiac on "ballast, which he described

as too large and too loose and was hard to kneel and walk on." *Ferra v. Canadian Nat'l/Illinois Central Railroad and Grand Trunk Western*, No. 05-72721 at 6 (E.D. Mich., May 14, 2007) (Battani, J.). The court granted summary judgment to Defendants according to the same law of preclusion. *Id.* at 8-15. An identical outcome is appropriate in this case. Plaintiff's attempt in his sur-reply brief to distinguish *Ferra* as only involving mainline track is unavailing. The federal regulation that occupies the field refers to "all track" without distinguishing between mainline and non-mainline track. 49 C.F.R. § 213.103. Moreover, the ballast requirements appear in a set of regulations that "prescribes initial minimum safety requirements *for railroad track that is part of the general railroad system of transportation*." 49 C.F.R. § 213.1 (emphasis added). Whether mainline track or not, there is no question of material fact concerning whether Plaintiff worked and walked along track that is part of the general railroad system of transportation. He did. The analysis of *Ferra*, therefore, is equally applicable to Plaintiff's case.[1]

In sum, the purposes of FRSA are not served by a broad reading of FELA that would lead to different results depending upon the vagaries of location and other variables posed by individual FELA claims. To the extent that Plaintiff relies upon persuasive

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[1] To the extent that Plaintiff also brings a claim under Michigan law, federal law, pursuant to the above analysis, preempts any state law claims.

authority from other jurisdictions that have concluded otherwise, this court is not persuaded.[2]

IV. CONCLUSION

IT IS ORDERED that Defendant's "Motion for Summary Judgment" [Dkt. # 16] is GRANTED. A separate judgment will issue.

S/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: May 30, 2007

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, May 30, 2007, by electronic and/or ordinary mail.

S/Lisa Wagner
Case Manager and Deputy Clerk
(313) 234-5522

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[2] The court need not reach Defendants' alternative argument that Plaintiff failed to establish that Defendants had actual or constructive knowledge of the defect that caused his injury.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 06-CV-11846-DT

[Filed May 30, 2007]

STANLEY R. NICKELS, Plaintiff,	)
v.	)
GRAND TRUNK WESTERN RAILROAD, INC., and CANADIAN NATIONAL/ILLINOIS CENTRAL, Defendants.	)

JUDGMENT

In accordance with the May 30, 2007 "Opinion and Order Granting Defendants' Motion for Summary Judgment,"

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendants Grand Trunk Western Railroad, Inc. and Canadian National/Illinois Central and against Plaintiff Stanley R. Nickels. Dated at Detroit, Michigan, this 30th day of May, 2007.

DAVID J. WEAVER
CLERK OF THE COURT

BY: S/Lisa Wagner
Lisa Wagner, Deputy Clerk
and Case Manager to
Judge Robert H. Cleland

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-1736

[Filed May 22, 2009]

STANLEY R. NICKELS, Plaintiff-Appellant,	)
v.	)
GRAND TRUNK WESTERN RAILROAD, INC., Defendant-Appellee.	)

ORDER

BEFORE: SILER, BATCHELDER, and ROGERS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Rogers would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX E

United States District Court
Eastern District of Michigan
Southern Division-Flint

Case No: 06-11846
Plaintiff Demands Trial By Jury

[Filed April 19, 2006]

STANLEY R. NICKELS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
Grand Trunk Western Railroad Inc.,	)
a Delaware corporation and a subsidiary	)
of Grand Trunk Corporation and	)
Canadian National/ Illinois Central;	)
successor to Grand Trunk Western	)
Railroad Company, a corporation;	)
	)
Defendant.	)
	)

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PLAINTIFF'S COMPLAINT AND JURY DEMAND

The Plaintiff, STANLEY R. NICKELS, by his attorneys, Harrington, Thompson, Acker & Harrington, LTD., complaining of the Defendant, Grand Trunk Western Railroad Inc., a Delaware corporation and a subsidiary of Grand Trunk Corporation and Canadian National/Illinois Central; successor to Grand Trunk Western Railroad Company, a corporation; (hereinafter the "GTW"); states:

1. Jurisdiction of this Court is invoked under the provisions of the Title 45 U.S.C. §56 and Title 28 U.S.C. §1331.

2. Defendant GTW is a corporation which operates a railroad as a common carrier engaged in interstate commerce between the various states of the United States.

3. Defendant GTW does business within the Eastern District of Michigan, employs citizens in this District, owns property within this District, and is subject to service of process and to the jurisdiction of this Court.

4. Plaintiff currently resides in Owosso, Michigan, Shiawassee County, which is located in the Eastern District of Michigan.

5. At the time and place alleged herein, Plaintiff was employed by Defendant GTW as a brakeman/conductor, and his duties as such were in furtherance of interstate commerce for Defendant GTW.

6. At the time and place alleged herein, both Plaintiff and Defendant GTW were subject to the Act of Congress known as the Federal Employers' Liability Act, Title 45 U.S.C. §51-60.

7. The plaintiff was first employed by the defendant railroad, or its predecessor in interest, on or about August 30, 1976, and subsequent thereto he was required to perform his assigned duties as a brakeman/conductor for the defendant at various locations owned, operated and/or maintained by the defendant.

8. At all times alleged herein, the plaintiff, STANLEY R. NICKELS, and the defendant, GTW, were subject to an Act of Congress, commonly known as the Federal Employers' Liability Act, 45 U.S.C. §§51-60, with regard to all claims for personal injuries and other pecuniary damages allegedly sustained by STANLEY R. NICKELS as a result of the aforesaid occurrence.

9. At all times alleged herein, railroad "ballast" was used by the defendant to support the railroad track structures owned, maintained and used by the defendant in areas where the plaintiff was required to perform his assigned duties.

10. At the times and places alleged herein, the plaintiff was required to walk on ballast in order to

perform his assigned duties as an employee of the defendant.

11. At the times and places alleged herein, the plaintiff was required to mount and dismount railroad equipment in areas where ballast was used to support the track and track structures in order to perform his assigned duties as an employee of the defendant.

12. At the times and places alleged herein, the defendant knew, or reasonably should have known, that the use of large, oversized ballast in areas where the plaintiff was required to perform his assigned duties created a foreseeable risk of injury, including the risk of developing a disabling injury over time due to the working conditions that existed in the areas where brakeman/conductors were required to perform their assigned duties.

13. At the times and places alleged herein, the defendant had superior knowledge to the plaintiff and to brakeman/conductors in general regarding the risk of injury that was created by the cumulative effect of working on ballast that was large, oversized, loose, untamped or otherwise unsuitable for the assigned duties of a brakeman/conductor.

14. At the times and places alleged herein, the defendant had a duty to warn the plaintiff of the risk of developing an injury over time from working on ballast that was large, oversized, loose, untamped or otherwise unsuitable for the assigned duties of a brakeman/conductor.

15. At the times and places alleged herein, the defendant had a duty to refrain from using large,

oversized, loose, untamped or otherwise unsuitable ballast in those areas where brakeman/conductors, including plaintiff, were required to walk in order to perform their assigned duties.

16. At the times and places alleged herein, the defendant had a duty to refrain from using large, oversized, loose, untamped or otherwise unsuitable ballast in those areas where brakeman/conductors, including the plaintiff, were required to mount and dismount railroad equipment.

17. At the times and places alleged herein, the defendant, had a duty to inspect the track, the ballast, the railroad yards and the locations where brakeman/conductors, including the plaintiff, were required to perform their assigned duties.

18. At the times and places alleged herein, the defendant had a duty to comply with the Code of Federal Regulations, 49 C.F.R. Part 213, Track Safety Standards §213, *et. seq.*

19. At the time and place aforesaid, the defendant, GTW, had a duty under the Federal Employers' Liability Act to comply with the Michigan Railroad Code of 1993, Mich. Comp. Laws. § 462, and the amendments thereto.

20. At the times and places alleged herein, the defendant had a duty, pursuant to the Federal Employers' Liability Act, to provide the plaintiff with a reasonably safe place to work.

21. At the times and places alleged herein, the defendant had a duty to provide the plaintiff with

reasonably safe methods, tools, equipment, materials and maintenance procedures.

22. The plaintiff has now learned that he developed physical injuries that were caused by the cumulative effect of working on ballast that was large, oversized, loose, untamped and otherwise unsuitable for use as a walking surface while performing the duties of a brakeman/conductor for the defendant.

23. At the times and places alleged herein, the defendant was negligent, and violated the Federal Employers' Liability Act in one or more of the following respects:

a. In failing to provide the plaintiff with a reasonably safe place to work;

b. In failing to use reasonably safe methods and procedures with regard to the use and maintenance of ballast in areas where brakeman/conductors, including the plaintiff, were required to perform their assigned duties;

c. In failing to comply with standard railroad practice regarding the type of ballast used, and the maintenance of ballast, in areas where brakeman/conductors, including the plaintiff, were required to perform their assigned duties;

d. In failing to comply with railroad industry standards and guidelines regarding the type of ballast used, and the maintenance of ballast, in areas where brakeman/conductors were required to perform their assigned duties;

e. In failing to comply with custom and practice in the railroad industry regarding the type of ballast used, and the maintenance of ballast, in areas where brakeman/conductors, including plaintiff, were required to perform their assigned duties;

f. In directing the plaintiff to work at various locations owned, maintained, and used by the defendant, where the track ballast was oversized, loose, untamped, and otherwise unsuitable as a walking surface for the work that the plaintiff was required to perform;

g. In failing to cover large, oversized ballast with small ballast suitable for walking and less certain to cause trauma to plaintiff in the performance of his duties;

h. In failing to cover large, oversized ballast with small sized, conforming ballast that was suitable for employees engaged in the duties required of a brakeman/conductor;

i. In failing to respond to complaints and protests regarding the condition of the ballast in areas where brakeman/conductors, including the plaintiff, were required to perform their assigned duties;

j. In failing to inspect adequately the track, yards and roadbeds where the plaintiff was directed to perform his assigned duties;

k. In failing to comply with the Code of Federal Regulations, 49 C.F.R. Part 213- Track Safety Standards $213.103 and subpart F-Inspection;

l. In failing to discover that large, oversized ballast was being used in areas where the defendant knew, or reasonably should have known and foreseen, that brakeman/conductors, including the plaintiff, were required to perform their assigned duties;

m. In failing to discover that the condition of the ballast would cause occupational injuries to the plaintiff and others in performing their assigned duties;

n. In failing to warn plaintiff of the risk and certainty of occupational injuries from working on large, oversized ballast, even though the defendant had superior knowledge to that of the plaintiff as to the consequences and risk of injury of working on oversized ballast;

o. In failing to require proper medical examinations and diagnostic studies to determine the damage done to the plaintiff as a result of being subjected to working on large, oversized, loose, untamped or otherwise unsuitable ballast;

p. In allowing unsafe practices regarding the placement, use and maintenance of ballast to become standard practice;

q. In failing to promulgate, implement, and enforce rules, regulations, and policies to

eliminate or reduce the damage done to brakeman/conductors, including the plaintiff, from working on large, oversized, loose, untamped or otherwise unsuitable ballast;

r. In failing to comply with the Michigan Railroad Code of 1993, Mich. Comp. Laws. §462, and the amendments thereto; and

s. In failing to comply with and in violating its' absolute duty under the Code of Federal Regulations, 49 C.F.R. Part 213, Track Safety Standards.

24. At the time and place aforesaid, the plaintiff, STANLEY R. NICKELS, sustained injuries of a personal and pecuniary nature, and sustained other recoverable damages supported by the evidence and permitted by law, all resulting, in whole or in part, from one or more violations by the defendant of the Federal Employers' Liability Act, and/or the Code of Federal Regulations.

WHEREFORE, the plaintiff, STANLEY R. NICKELS, prays for judgment against the defendant, GTW, in an amount the court and the jury deem proper as compensatory damages, plus the costs of this lawsuit.

Respectfully submitted,

/s/_____
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JURY DEMAND

The plaintiff, by his attorneys, Robert B. Thompson and Harrington, Thompson, Acker & Harrington, Ltd., hereby demands a trial by jury.

Respectfully submitted,

/s/Robert B. Thompson
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& Harrington, Ltd.
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APPENDIX F

Norfolk Southern Railway Co. v. Box,
556 F.3d 571 (7th Cir. 2009)

In the
United States Court of Appeals
For the Seventh Circuit

No. 08-1116

[Filed February 11, 2009]

NORFOLK SOUTHERN RAILWAY COMPANY,	)
Plaintiff-Appellant,	)
v.	)
CHARLES E. BOX and the other Commissioners of the Illinois Commerce Commission,	)
Defendants-Appellees.	)

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 06 C 641—**Virginia M. Kendall**, *Judge*.

ARGUED DECEMBER 8, 2008—
DECIDED FEBRUARY 11, 2009

Before EASTERBROOK, *Chief Judge*, and BAUER and SYKES, *Circuit Judges*.

EASTERBROOK, *Chief Judge*. Illinois requires rail switching yards built or substantially renovated after February 2005 to include walkways, parallel to each track, for persons who work there. 625 ILCS 5/18c–7401.1; 92 Ill. Admin. Code §1546.10 *et seq*. Norfolk Southern Railway contends that federal law supersedes this requirement. A federal regulation "covering the subject matter of the State requirement" preempts it. 49 U.S.C. §20106. And even if no federal regulation covers the subject, states are forbidden to adopt laws or regulations that conflict with or prevent achievement of federal objectives. See *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993). The district court determined that the national government has not adopted any regulation "covering the subject matter" of paths adjoining railroad tracks. 2007 U.S. Dist. LEXIS 23879 (N.D. Ill. Mar. 30, 2007). Then, after a bench trial, the court found that Illinois's requirements do not conflict with any federal objective. 2007 U.S. Dist. LEXIS 92367 (N.D. Ill. Dec. 17, 2007). The court entered judgment for the state, and the railroad has appealed.

Several states have laws or regulations requiring walkways in rail switching yards. Both state and federal courts are divided on the question whether these rules are compatible with federal law. Compare *Southern Pacific Transportation Co. v. California Public Utilities Commission*, 820 F.2d 1111 (9th Cir. 1987) (California rules valid), *Elston v. Union Pacific R.R.*, 74 P.3d 478 (Colo. App. 2003) (Colorado rules valid), and *CSX Transportation, Inc. v. Miller*, 159 Md. App. 123, 858 A.2d 1025 (2004) (Maryland rules valid),

with *Missouri Pacific R.R. v. Texas Railroad Commission*, 948 F.2d 179 (5th Cir. 1991) (Texas rules preempted), and *Black v. Seaboard System R.R.*, 487 N.E.2d 468 (Ind. App. 1986) (Indiana rules preempted). These decisions start, as do we, with this federal law:

> Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—
>
> > (1) is necessary to eliminate or reduce an essentially local safety or security hazard;
> >
> > (2) is not incompatible with a law, regulation, or order of the United States Government; and
> >
> > (3) does not unreasonably burden interstate commerce.

49 U.S.C. §20106 (recodified from 45 U.S.C. §434 in 1994 and amended in 2002). Norfolk Southern

contends that federal regulations already cover the subject of walkways, thus preempting the state rules (for Illinois does not contend that they may be sustained under the "essentially local . . . hazard" proviso).

The major problem with the railroad's position is that no federal regulation deals with walkways. Railroads are free to install them, or not, as they see fit. And if railroads may choose whether to have walkways, how then could it be said that there is a federal regulation that forbids states from acting? Norfolk Southern's answer is that federal regulations *do* specify how rail lines must be built. See 49 C.F.R. §213.103. The railroad must prepare a roadbed (or subgrade) of compacted earth. A layer of sub-ballast, made of crushed stone, goes on top of the roadbed. Then a section of sloped ballast, made from slightly smaller crushed stone, goes on top of the sub-ballast. The crossties and rails are laid on the ballast, which transmits the load to the roadbed while allowing water to drain through without turning the roadbed to mud. Federal rules set a maximum slope and minimum size of the ballast. See 49 C.F.R. §§ 213.1 to 213.241 (four parts covering track safety standards). None of these rules deals with walkways, but Norfolk Southern maintains that they "cover" the subject because any walkway is bound to affect the slope of the ballast, its drainage properties, or both.

This understanding of what it means for a federal regulation to "cover" a subject would make §20106's second sentence internally contradictory. Here is that sentence again: "A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation

(with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement." The sentence deals with state laws and regulations that are "related to railroad safety and security" and provides that they are preempted if there is a federal regulation "covering the subject matter of the State requirement." Norfolk Southern observes that many federal regulations deal with railroad safety. It necessarily follows, from the Railway's perspective, that any state regulation "related to railroad safety" *must* be "covered" by a federal regulation. But then the sentence we have quoted is self-defeating: Instead of providing a division between state and federal spheres (in which the state rule prevails unless a federal rule covers the topic), the sentence would effectively read: "All state laws and regulations related to railroad safety and security are preempted." That is not, however, what the actual sentence says. The structure of the statute's second sentence makes sense only if the category of "covering" federal regulations is a subset of all topics related to railroad safety and security. And that is how the Supreme Court has understood the word "cover", giving it a relatively narrow scope compared with all safety-related issues. *Easterwood*, 507 U.S. at 664–65. The rules for roadbed construction and maintenance do not "cover" the subject of adjacent walkways.

Norfolk Southern relies on a policy statement as well as the roadbed regulations. In 1978 the Federal Railroad Administration told railroads to ignore any regulations that the Occupational Safety and Health Administration had prescribed for walkways, because walkways in railroad yards "are so much a part of the

operating environment that they must be regulated by the agency with the primary responsibility for railroad safety." 43 Fed. Reg. 10,587 (1978). This does not sound like a statement that the regulations for roadbeds, ballast, and drainage already deal with the topic; the safety of workers *on* walkways—whether they are too steep or slippery, whether the walkways are too close to the rails and create a risk of workers being struck by moving trains, and so on—is distinct from questions about stability and drainage of tracks. The 1978 declaration suggests that the FRA contemplated issuing rules about walkways, but in the ensuing 30 years it has not done so. To the contrary, it has left in place a decision taken in 1977 that federal walkway rules should not be adopted. In 1976 the FRA had asked for comments on the question whether it should require walkways adjacent to the tracks on trestles and bridges. 41 Fed. Reg. 50,302 (1976). After receiving comments the FRA decided not to act, explaining that, "if an employee safety problem does exist because of the lack of walkways in a particular area or on a particular structure, regulation by a State agency that is in a better position to assess the local need is the more appropriate response." 42 Fed. Reg. 22,184–85 (1977). Illinois took the FRA at its word.

On to the question whether Illinois's system conflicts with federal rules or objectives. Illinois allows the railroads considerable discretion over the size, placement, and materials of the walkways. They may be made from concrete, asphalt, wood, or gravel. All that the state requires is that they be non-slippery, at least two feet wide, and slope no more than 1 inch of elevation change for 8 inches of width or length. Norfolk Southern says that wooden walkways are impractical and that impervious materials (concrete or

asphalt) would direct rainwater and snowmelt toward the tracks and overwhelm their drainage-control systems, so gravel is the only feasible material. At the bench trial, two experts testified for Norfolk Southern that even gravel walkways would cause drainage problems. The district judge found otherwise; unless that finding is clearly erroneous, the Railway must lose.

Jeffrey McCracken, Norfolk Southern's Assistant Vice President of Maintenance, was its principal expert. McCracken testified that the tracks in switching yards are located so that their centerlines are 14 feet apart. Ballast is flat at the top (supporting the crossties and rails) and slopes of 1:2 rise over run at the side, down to the subballast. Only 4½ feet separate the flat areas at the top of the ballast, so the 1:2 side slope means that there is a V-shaped area between each track. Flattening that area by adding gravel to form a walkway there would interfere with drainage, McCracken testified, and thus imperil the tracks' stability by increasing the risk that mud would form—for even though Norfolk Southern constructs a drainage system of pipes and culverts under each rail yard, to improve on natural drainage, more gravel between the tracks would cover the inlets of this drainage system and hamper its effectiveness.

McCracken's testimony may well be sound, but the district judge did not believe it. She gave two reasons. First, the record contains photographs of three of Norfolk Southern's switching yards. None of the photos shows a V-shaped depression between adjacent tracks. They show, instead, a shallow slope—less than the 1:8 required by Illinois law, so the Railway may *already* be in compliance. If the Railway operates its yards with

shallow slopes, the judge observed, then it is hard to see how the state's requirements will cause safety problems. McCracken responded that the yards depicted in the photos are abnormal and experience drainage problems, but neither he nor the Railway produced photographs of yards with the V-shaped depression that he described, and neither McCracken nor any other witness produced details about the supposed drainage problems at the three depicted yards. The judge concluded that, whatever McCracken's design preferences may be, a shallow topography satisfying the Illinois rules has not caused demonstrable drainage or safety problems.

The judge's second reason was an inference from silence. Some railroads have built walkways voluntarily and others have built them under the compulsion of state regulation. California's rules have been in force for more than 20 years. What has happened in the places where walkways adjoin the tracks? Have these tracks required extra maintenance because of drainage problems? Have trains derailed, or been subject to speed limitations, because of stability problems traceable to walkways? Many thousands of miles of track must have been affected. (Norfolk Southern alone has more than 300 miles of track in its Illinois switchyards.) This facilitates statistical analysis that could identify even a small effect per mile. The judge asked McCracken and the other expert whether they had analyzed the experience of railroads that have walkways adjacent to their track. They replied that they had not. The judge asked whether they knew about any published literature on the question; they replied that they did not. We asked the same question of the Railway's appellate counsel, who likewise responded that he did not know of any

analysis of the effects of California's law, of the laws in Colorado and other states, or of walkways voluntarily constructed elsewhere. (Nor did counsel contend that other states' regulations differ in any material way from Illinois's, preventing a useful comparison.)

That's a telling omission. In *Missouri Pacific* the district judge predicted that enforcement of Texas's rules would adversely affect drainage and thus jeopardize railroad safety; the fifth circuit held that the finding was not clearly erroneous, and the upshot was a declaration that the Texas requirement was preempted. One can do only so much with projections. Talk is cheap; when it is possible to test whether a prediction has come true, then a test is essential. See *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993). Norfolk Southern did not use the opportunity to put its assessment to a test. Because nothing in this record (or any published literature we could find) suggests that the walkway regulations of other states have imperiled rail safety, or even affected railroads' costs of maintaining a constant level of safety, the district court's findings of fact are not clearly erroneous. And, given those findings, the state is entitled to enforce its walkway requirement.

According to Norfolk Southern, it is physically impossible to comply with the state's rules for some tracks in some yards. It gives as an example tracks constructed at different heights (tracks for through trains may be two or three feet higher in elevation than adjacent switching tracks), which make it impossible to satisfy the state's 1:8 limit on walkway slope. How this presents a question of federal law is unclear. For its part Illinois insists that the Railway is overstating the problem and that the impossible is

never required. For adjacent tracks at different elevations, the state says, it will be satisfied with a walkway on one side of each track, something that can be done even though there isn't room to build between the tracks a high walkway for the higher track and a low walkway for the lower track. The Railway suspects that its definition of "impossibility" will turn out to be different from the state's. But federal courts do not issue advisory opinions. Norfolk Southern must try to work these details out with the state commission. Any order that presents a question of federal law can be reviewed once a concrete dispute has ripened.

AFFIRMED

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(2)

Supreme Court, U.S.
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No. 09-224

In the Supreme Court of the United States

STANLEY R. NICKELS,

Petitioner,

v.

GRAND TRUNK WESTERN RAILROAD, INC.,

Respondent.

On Petition for a Writ of Certiorari to United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Federal Railroad Safety Act (FRSA) declares that "[l]aws, regulations, and orders related to railroad safety * * * shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). To ensure that uniformity, the FRSA directs the Secretary of Transportation to "prescribe[] a regulation [and] issue[] an order" for every area of railroad safety and expressly preempts any state "law, regulation, or order related to railroad safety" when federal regulations "cover[] the subject matter of the State requirement." *Id.* §§ 20101, 20106(a)(2). Each circuit to reach the issue has held that the FRSA not only preempts state-law actions but also precludes negligence claims brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51, which creates a federal cause of action for railroad employees who are injured as a result of their employer's negligence. Pursuant to the FRSA, the Federal Railroad Administration (FRA) has issued comprehensive track safety regulations, including a regulation—codified at 49 C.F.R. § 213.103—governing "ballast," the crushed stone used to support railroad track. The questions presented are:

1. Whether the Sixth Circuit—in accord with every other circuit to have reached the issue—correctly held that the FRSA precludes a FELA negligence claim where an FRA regulation covers the subject matter of that claim.

2. Whether the Sixth Circuit—the only court of appeals or state high court to have addressed the issue—correctly held that 49 C.F.R. § 213.103 precludes a FELA claim alleging that a railroad was negligent in its selection of a certain size of ballast for use in a particular location.

RULE 29.6 STATEMENT

Grand Trunk Western Railroad Company, the successor to Grand Trunk Western Railroad Incorporated, is a wholly owned subsidiary of its parent company, Grand Trunk Corporation, which is a wholly owned subsidiary of Canadian National Railway Company, a publicly traded Canadian corporation. No other publicly held company owns more than 10% of respondent's stock.

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RESPONDENT'S BRIEF IN OPPOSITION

This case does not warrant review. There is no conflict among the circuits as to either question presented.

Every circuit to have reached the issue agrees that the FRSA precludes a FELA negligence action when an FRA regulation covers the subject matter of the suit. Those circuits—the Fifth, Sixth, and Seventh—unanimously recognize that Congress's goal of national uniformity in the regulation of railroad safety would be seriously undermined if plaintiffs were, through FELA actions, allowed to impose additional duties beyond those mandated by the relevant FRA regulation.

Nor is there any conflict as to whether 49 C.F.R. § 213.103 covers, and therefore precludes, a FELA action alleging that the defendant railroad was negligent in selecting "mainline" ballast, rather than smaller "yard" ballast, to support railroad tracks in locations receiving employee foot traffic. Indeed, there can be no conflict because the Sixth Circuit is the *only* circuit or state high court to have addressed that question. There is, moreover, little doubt that the court resolved the issue correctly: 49 C.F.R. § 213.103 (and a host of related regulations incorporated therein) substantially subsumes the subject of ballast selection.

Even if petitioner were correct that the circuits are divided over "whether 49 C.F.R. § 213.103 covers the subject of *walkways adjacent to railroad tracks*" (Pet. i (emphasis added)), this case does not present that question. As petitioner conceded in the district court, and as the Sixth Circuit expressly found below, this case (like the case with which it was consol-

idated below) specifically concerns *ballast that was used to support railroad tracks.* See Pet. App. 14a–15a. By contrast, the allegedly conflicting cases cited by petitioner concern state regulations requiring the construction of non-supportive walkways. The question in those cases, whether 49 C.F.R. § 213.103 covers state regulations mandating walkways adjacent to railroad tracks, is wholly distinct from the question in this case: whether 49 C.F.R. § 213.103 covers a FELA claim alleging that the respondent railroad had a duty to use a particular size of ballast to support its tracks. As to that question, there is no conflict among the circuits.

STATEMENT

A. Statutory and Regulatory Background

1. The Federal Employers' Liability Act

FELA creates a federal cause of action for railroad employees who are injured as a result of their employer's negligence. The pertinent provision provides:

> Every common carrier by railroad while engaging in commerce * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51.

FELA neither prohibits nor requires specific conduct on the part of a railroad. Instead, FELA is "founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms." *Urie* v. *Thompson*, 337 U.S. 163, 182 (1949). Because the statute "does not define negligence, leaving that question to be determined * * * by the common law principles as established and applied in the federal courts" (*id.* at 174 (internal quotation marks omitted)), claims brought under FELA are decided by juries on an ad hoc basis.

2. The Federal Railroad Safety Act

In an effort to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents" (49 U.S.C. § 20101), Congress enacted the FRSA, directing the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety" (49 U.S.C. § 20103(a)).[1]

Recognizing that the railroad industry has "a truly interstate character calling for a uniform body of regulation and enforcement" (H.R. Rep. No. 91-1194, at 13, *reprinted in* 1970 U.S.C.C.A.N. 4101, 4110), Congress "declare[d] that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable." Pub. L. No. 91-458 § 205, 84 Stat. 971, 972, (1970). As the House Report accompanying the FRSA concluded, "subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems" would not advance "safety

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[1] The Secretary of Transportation has delegated this authority to the FRA. See 49 C.F.R. § 1.49(m).

in the Nation's railroads." H.R. Rep. No. 91-1194 at 11, 1970 U.S.C.C.A.N at 4109. Accordingly, "where the federal government has authority, with respect to rail safety, it preempts the field." *Id.* at 11, 1970 U.S.C.C.A.N. at 4108.

Although amended since its initial passage,[2] the FRSA continues to expressly provide that "[l]aws, regulations, and orders related to railroad safety * * * shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). The statute thus allows a state to "adopt or continue in force a law, regulation, or order related to railroad safety," but only "until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement."[3]

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[2] Congress amended § 20106 as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, Title XV, § 1528, 121 Stat. 266, 453. The amendment retained the prior preemption provision in its entirety, renumbering it as § 20106(a), and added two additional subsections. As noted at the time it was adopted, the restructuring of the preemption provision was "not intended to indicate any substantive change in the meaning of the provision." H.R. Rep. No. 110-259, at 351 (2007) (Conf. Rep.), *reprinted in* 2007 U.S.C.C.A.N. 119, 183. Newly added § 20106(b) clarifies that a preemption defense is unavailable only where the defendant violated: (i) a governing federal regulation (see § (b)(1)(A)); (ii) an internal standard adopted pursuant to such a regulation (see § (b)(1)(B)); or (iii) a state law that is not otherwise preempted by subsection (a)(2) (see § (b)(1)(C)). As the district court found, petitioner has not alleged any of these conditions. See Pet. App. 27a.

[3] The statute also contains a narrowly circumscribed exception, not relevant to this case, that allows states under certain conditions to adopt laws "necessary to eliminate or reduce an essentially local safety or security hazard." 49 U.S.C. § 20106(a)(2)(A).

3. FRA Regulations

Soon after passage of the FRSA, the FRA promulgated initial Track Safety Standards, which "prescribe[d] initial minimum safety requirements for railroad track." 36 Fed. Reg. 20,336, 20,338 (Oct. 20, 1971). "[B]ased on the safety practices of the rail industry at that time, available track-related data, and public comments and testimony" (44 Fed. Reg. 52,104, 52,107 (Sept. 6, 1979)), these initial standards were intended to operate as an evolving set of safety requirements that would "be continually reviewed and revised by FRA in light of technical innovation, the results of the FRA research and development program, and [regulatory] experience" (36 Fed. Reg. at 20,336). In fact, the FRA has revised and expanded the Track Safety Standards several times since their initial promulgation. See, *e.g.*, 71 Fed. Reg. 59,677 (Oct. 11, 2006); 66 Fed. Reg. 1894 (Jan. 10, 2001); 63 Fed. Reg. 33,992 (June 22, 1998); 47 Fed. Reg. 39,398 (Sept. 7, 1982).

Divided into several interconnected subparts, the standards regulate, among other things, train speed, track alignment, track elevation, cross-ties, drainage, and vegetation control. See 49 C.F.R. §§ 213.1–.369. Ballast, the subject of this case, is one of the matters specifically regulated by the FRA. The FRA regulation governing ballast provides:

> § 213.103 Ballast; general.
>
> Unless it is otherwise structurally supported, all track shall be supported by material which will –
>
> (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;

(b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;

(c) Provide adequate drainage for the track; and

(d) Maintain proper track crosslevel, surface, and alinement.

49 C.F.R. § 213.103.

Significantly, the ballast regulation was expressly reaffirmed by the FRA after a congressionally mandated safety review. Congress—through the Rail Safety Enforcement and Review Act of 1992, Pub. L. No. 102-365, 106 Stat. 972, as amended by the Federal Railroad Safety Authorization Act of 1994, Pub. L. No. 103-440, 108 Stat. 4615—ordered the FRA to review all of its "regulations related to track safety standards." 49 U.S.C. § 20142(a). Congress specifically directed the FRA to review its regulations in light of "employee safety." 49 U.S.C. § 20142(a)(3). At the conclusion of the mandatory review, the FRA was required to "revise track safety standards, considering safety information presented during the review." 49 U.S.C. § 20142(b). Pursuant to this congressional directive, the FRA convened a working group which—after having "systematically surveyed the existing regulations to identify those sections and subsections that needed updating" (63 Fed. Reg. at 33,993)—unanimously recommended that the FRA ballast regulation set forth in 49 C.F.R. § 213.103 "remain as currently written." 63 Fed. Reg. at 34,006. The FRA "agree[d] with the recommendation," adopted it

as its own, and affirmatively decided to let 49 C.F.R. § 213.103 stand unchanged. *Ibid.*

The FRA ballast regulation is just one part of "an integrated undertaking" that comprises "numerous elements." Policy Statement, 43 Fed. Reg. 10,583, 10,585 (Mar. 14, 1978). Given their interdependence, "[a]s a general rule, it is not possible to reguiate an individual hazard without impacting on other, related working conditions, nor without impacting on the safe transportation of persons and property." *Ibid.* For that reason, "piecemeal regulation * * * would be disruptive and contrary to the public interest." *Id.* at 10,586. It is, therefore, "essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on longstanding industry practices and pre-existing regulations." *Id.* at 10,585. The FRA is that agency. The FRA has "special competence" in "traditional areas of railroad operations" and has "developed a special expertise which makes [it] uniquely qualified to play the primary role in the Federal Government's efforts to assure safe employment for railroad employees engaged in activities related to railroad operations." *Ibid.*

Lest "piecemeal regulation" interfere with the agency's "integrated undertaking," in 1998 the FRA promulgated a regulation underscoring the preemptive effect of its track safety standards, which, as noted above, include the ballast regulation. See 49 C.F.R. § 213.2 (reiterating that "[u]nder 49 U.S.C. 20106, issuance of these regulations preempts any State law, regulation, or order covering the same subject matter" except under certain narrowly de-

fined circumstances). Although the regulation merely restates the FRSA preemption provision, the FRA felt compelled to "provide[] a statement of agency intent" that "promotes national uniformity of regulation in accordance with the statute." Track Safety Standards, 62 Fed. Reg. 36,138, 36,146 (July 3, 1997).

B. Ballast

For good reason, the FRA ballast regulation does not dictate what size of ballast should be used in particular locations. Deciding which size of ballast is most likely to satisfy the functional requirements set forth in 49 C.F.R. § 213.103 (as well as the interconnected cross-level, surface, and alignment requirements set forth in 49 C.F.R. §§ 213.55, 213.57, and 213.63) is a complex process that must be undertaken with detailed knowledge of local conditions.

Petitioner's theory of the case is that Grand Trunk was negligent in using larger-sized "mainline" ballast instead of smaller-sized "yard" ballast in various locations where he had to walk during the performance of his job duties. But because it is smaller than mainline ballast, yard ballast provides less structural support for the tracks than mainline ballast.[4] See, *e.g.*, *Norris* v. *Cent. of Ga. R.R.*, 635 S.E.2d 179, 181–82 (Ga. Ct. App. 2006) (noting evidence

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[4] There was uncontroverted evidence of this fact before the court below. See, *e.g.*, J.A. at 209, *Cooper* v. *CSX Transp., Inc.*, No. 07-2437 (6th Cir.) (testimony that larger mainline ballast "helps for the restraint of the track to keep it in position"); *id.* at 137 (testimony that mainline ballast is preferable to yard ballast "from the standpoint of supporting and the maintenance of the main track"). *Cooper* and this case were consolidated below. See *infra* n.6.

that mainline ballast was necessary in yard to provide adequate support for switch). Thus, use of yard ballast is more likely to result in swaying trains and derailments, each of which presents its own significant safety hazards to railroad workers. Cf. Pet. App. 17a n.1 (Rogers, J., dissenting) ("By preventing train derailments," through the promulgation of 49 C.F.R. § 213.103, "the FRA is making for much safer employee conditions."). Similarly, because it traps more dirt and other debris than mainline ballast, yard ballast tends to allow more mud to form and more vegetation to grow alongside the tracks, conditions that can both undermine the tracks' structural integrity and pose hazards to workers.[5] See *Norris*, 635 S.E.2d at 182 (noting evidence that mainline ballast was required "'[f]or the water drainage'"). Yard ballast may be sufficient in locations where trains move very slowly and precipitation is rare. But even then, yard ballast may be inappropriate where, for example, open cars are likely to spill materials, such as phosphate or coal, which can easily clog the voids between the ballast stones.

For these reasons, the FRA has decided to leave the judgment as to which ballast is safest in a particular location to the railroad, which alone possesses the requisite local knowledge to ensure that the ballast selected will, under the given conditions, fulfill the functional requirements set forth in exacting de-

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[5] There was also uncontroverted evidence of this fact before the Sixth Circuit. See, *e.g.*, J.A. at 209, *Cooper* v. *CSX Transp., Inc.*, No. 07-2437 (6th Cir.) (testimony that yard ballast would "mud up" and "breakdown under the loads causing muddy conditions and unstable track surfaces" and "inhibit[] the drainage as well").

tail in 49 C.F.R. §§ 213.33, 213.37, 213.55, 213.57, and 213.63.

C. Proceedings Below

Petitioner worked for respondent from 1976 to 2004 as a switchman and conductor, in which roles he often walked on ballast. Pet. App. 25a, 38a–39a. Petitioner alleges that for a two-year period, when working in Lansing, Michigan, his job duties required him to walk primarily upon mainline ballast, which, he asserts, caused him to develop an arthritic toe condition. Pet. 7; Pet. App. 4a, 25a, 41a. This toe condition, he alleges, necessitated surgery in 2004 and ultimately caused him to become medically disabled. Pet. App. 4a, 25a.

1. Proceedings in the District Court

Petitioner filed suit in federal district court, asserting a single claim under FELA. The gravamen of petitioner's complaint was that respondent Grand Trunk was negligent in having selected ballast that was, allegedly, too large and not level. Pet. 7; Pet. App. 5a, 25a.

Following discovery, Grand Trunk moved for summary judgment. In opposing the motion, petitioner framed the issue as whether "plaintiff's complaint [should] be dismissed for failure to present a genuine issue of material fact of defendant's negligence in the selection and maintenance of the track ballast structure." Plf. Mem. in Resp. to Def. Mot. for S.J., at 2, *reproduced in* 6th Cir. J.A. at 237. Petitioner simultaneously conceded that the ballast about which he complains "is an essential component of the track structure." Cf. Plf. Resp. to Def. Stmt. of Material Facts ¶ 4, *reproduced in* 6th Cir. J.A. at 243

(admitting facts set forth in Def. Stmt. of Material Facts ¶ 4, *reproduced in* 6th Cir. J.A. at 231).

The district court granted Grand Trunk summary judgment, holding that petitioner's claim was precluded by the FRSA. Relying on Fifth and Seventh Circuit precedent holding FELA claims predicated on excessive train speed to be precluded by FRA regulations setting maximum allowable speeds, the district court determined that "[i]n the same way that federal speed regulations set uniform national ceilings that a FELA claim of negligence cannot alter, the ballast regulations set a base level that a FELA claim may not augment." Pet. App. 29a (citations omitted). Thus, because "[t]he ballast requirements substantially subsume the subject matter of [petitioner]'s theory of recovery," respondent "owed [petitioner] no duty separate from complying with the federal ballast requirements." *Id.* at 28a–29a. Deciding otherwise, the court warned, would lead to substantial variation in railroad regulations across the nation, "depending upon the vagaries of location and other variables posed by individual FELA claims." *Id.* at 30a.

2. Proceedings in the Court of Appeals

The court of appeals affirmed.[6] The court first addressed "whether a FELA claim is precluded if the same claim would be preempted by the FRSA if brought as a state-law negligence action," and unanimously concluded that such a claim is precluded

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[6] The court of appeals consolidated petitioner's appeal with the plaintiff's appeal in *Cooper* v. *CSX Transportation, Inc.*, No. 07-2437, a case involving substantially similar facts and an identical FELA negligence claim. The plaintiff in that case did not seek review in this Court.

by the FRSA. Pet. App. 7a; see also *id.* at 15a (Rogers, J., dissenting) ("Like the majority, I agree with the well-reasoned holdings from other jurisdictions that a railway-safety claim that would be preempted by the FRSA if brought by a nonemployee under state tort law, would necessarily be precluded by the FRSA if brought by a railroad employee under the FELA."). Observing that "[t]wo of our sister circuits have held that the uniformity demanded by the FRSA 'can be achieved only if [federal rail safety regulations] are applied similarly to a FELA plaintiff's negligence claim and a non-railroad-employee plaintiff's state law negligence claim,'" the court below "agreed" that "[d]issimilar treatment of [state and federal] claims would [make] * * * the railroad safety regulations established under the FRSA virtually meaningless" because a "'railroad could at one time be in compliance with federal railroad safety standards with respect to [state] plaintiffs yet be found negligent under the FELA with respect to [federal] plaintiffs for the very same conduct.'" *Id.* at 7a–8a (quoting *Lane* v. *R.A. Sims, Jr., Inc.*, 241 F.3d 439, 443 (5th Cir. 2001)). Accordingly, the court held that petitioner's "claims are precluded by the FRSA if they would have been preempted if brought by a non-employee under state law." *Id.* at 8a.

Having decided that petitioner's FELA claim *could* be precluded by the FRSA, the court next held that it *was* precluded. Pet. App. 9a. The court began its analysis by noting that the FRA ballast regulation "provides that '*all* track shall be supported by material' able to transmit and distribute track and equipment loads, restrain the track under dynamic loads and thermal stress, provide adequate drainage, and maintain proper track crosslevel, surface, and alinement," *Id.* at 9a–10a (quoting 49 C.F.R.

§ 213.103). Thus, the FRA "has directed railroads to install ballast sufficient to perform key support functions under the conditions applicable to the track" at issue. *Id.* at 11a. The court recognized that because "these conditions necessarily are track-specific," the FRA regulation, "[r]ather than prescribing ballast sizes for certain types or classes of track," instead "leaves the matter [of ballast size] to the railroads' discretion so long as the ballast performs the enumerated support functions." *Id.* at 10a–11a. "In this way," the court concluded, "the regulation substantially subsumes the issue of ballast size." *Id.* at 10a.[7]

The court of appeals specifically rejected petitioner's attempt to reframe the case as one involving walkways "adjacent to the track." Pet. App. 13a–14a. Noting that petitioner's complaint alleges that respondent was negligent for having used oversized ballast "*to support the railroad track* * * * in areas where [petitioner] was required to perform his assigned duties," the court found that petitioner had not alleged negligence with respect to the railroad's selection of ballast in any areas other than "those where track stability and support are concerned." *Id.* at 14a.[8] Thus, the court concluded, "[e]ven to the ex-

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[7] Judge Rodgers dissented from this portion of the Sixth Circuit's decision. In his view, "nothing in 49 C.F.R. § 213.103 or any related regulations addresses the issue of trackside walkways and ballast size." Pet. App. 16a. Thus, while he agreed that the FRSA precludes FELA claims when FRA regulations cover the subject matter of those claims (see *supra* 11–12), he would have held that 49 C.F.R. § 213.103 does not cover, and thus does not preclude, the specific claim at issue here.

[8] The court also noted that the plaintiff in *Cooper*, the case with which this case was consolidated, had likewise admitted that that "[t]he purpose of ballast is to provide support and

tent that the [petitioner] argue[s] oversized ballast was used 'along,' 'adjacent to,' or 'parallel to' the track, [he] do[es] not contend that the ballast in those areas was not being used for stability under § 213.103." *Id.* at 14a–15a. Accordingly, the court held that "49 C.F.R. § 213.103 covers the issue of ballast size and precludes the [petitioner's] FELA claim[]." *Id.* at 15a.

REASONS FOR DENYING THE PETITION

Nothing about this case warrants this Court's attention. There is no conflict in the lower courts as to any issue presented in this case, and the decision below was correct.

There is no conflict over whether the FRSA precludes a FELA claim where an FRA regulation covers the subject matter of that claim. Every federal court of appeals to have previously considered the issue has concluded, as did the Sixth Circuit below, that the FRSA *does* preclude a FELA claim under those circumstances. In joining the Fifth and Seventh Circuits, the Sixth Circuit simply followed the uniform, well-established precedent of its sister circuits.

Nor is there any conflict as to whether the FRSA precludes the particular FELA claim at issue here. Indeed, there can be no conflict as to that issue because thus far the Sixth Circuit is the *only* circuit (or state high court) to have addressed whether 49 C.F.R. § 213.103 precludes a FELA action alleging that the defendant railroad was negligent in its selection of ballast. That the lower courts might be divided, as petitioner asserts, over the preemption of state laws requiring the construction of walkways

adaquate drainage to the track structure." Pet. App. 14a (internal quotation marks omitted).

adjacent to tracks is irrelevant; as the court below made clear, that issue is not presented here. As to the questions that *are* presented here, there is no conflict.

Moreover, the decision below is correct. The FRA ballast regulation, 49 C.F.R. § 213.103, does cover the subject matter of—and does therefore preclude—petitioner's claim. The regulation, which the agency expressly reaffirmed after a congressionally mandated safety review, concerns the selection of ballast. It directs railroads to select ballast that will satisfy various highly detailed, federally mandated performance standards. It leaves the choice of which sized ballast to use in a given location to the railroad given the need to satisfy those exacting performance standards under highly varying local conditions. Inasmuch as petitioner's claim would impose a duty on the railroad to select a particular sized ballast regardless of other considerations, it is covered by 49 C.F.R. § 213.103. The Sixth Circuit was therefore correct in concluding that petitioner's claim is precluded by the FRSA.

Accordingly, this Court's review is not warranted.

I. THERE IS NO CONFLICT AMONG THE LOWER COURTS CONCERNING THE QUESTIONS PRESENTED.

A. Every Circuit To Have Reached The Issue Has Held That The FRSA Can Preclude FELA Claims.

Every federal court of appeals to have considered the question has concluded that the FRSA precludes

a FELA action when an FRA regulation covers the subject matter of that action.[9]

In *Waymire* v. *Norfolk & Western Railway*, 218 F.3d 773 (7th Cir. 2000), the Seventh Circuit considered whether the FRSA and FRA regulations promulgated thereunder precluded FELA claims arising from a collision between a train and a truck. The plaintiff alleged that the train was traveling at an excessive speed and that the railroad had installed inadequate warning devices at the crossing where the accident took place. The train, however, was traveling within the federally prescribed speed limit, and the warning devices installed at the crossing complied with federal standards. See *id.* at 776–77. Recognizing that this Court had found comparable state law claims to be preempted by the FRSA in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000), the Seventh Circuit held that it "must strike the same result" in FELA cases "in order to uphold FRSA's goal of uniformity." *Waymire*, 218 F.3d at 776. Accordingly, the court held that both of the plaintiff's FELA claims were precluded by the FRSA. See *id.* at 777. With reference to the plaintiff's inadequate warning devices claim, but in words equally applicable to the excessive speed claim, the court stated: "Given that the federal agency empowered by Congress to establish uniform, comprehensive federal safety standards related to warning devices at grade crossings has promulgated such regulations, federal common law

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[9] Petitioner does not identify, and respondent is unaware of, any state high court having addressed the issue.

and statutes on these issues are necessarily displaced." *Ibid.*

The Fifth Circuit reached the same result in *Lane* v. *R.A. Sims, Jr., Inc.*, 241 F.3d 439 (5th Cir. 2001). In *Lane*, a railroad employee sought damages under FELA for injuries he sustained in a railroad crossing collision. The plaintiff argued that the train was traveling at an unsafe speed at the time of the collision, even though it was going below the speed limit established by FRSA regulations. *Id.* at 441. The district court granted summary judgment to the railroad on preclusion grounds, and the plaintiff appealed. Acknowledging "Congress' intent that railroad safety regulations be nationally uniform to the extent practicable" and recognizing that "[s]uch uniformity can be achieved only if the regulations covering train speed are applied similarly to a FELA * * * negligence claim and a * * * state law negligence claim" (*id.* at 443), the Fifth Circuit affirmed. Following *Waymire*, which it found "persuasive" (*ibid.*), the court explained that "[d]issimilar treatment" of federal and state common-law claims "would have the untenable result of making the railroad safety regulations established under the FRSA virtually meaningless: 'The railroad could at one time be in compliance with federal railroad safety standards with respect to certain classes of plaintiffs yet be found negligent under the FELA with respect to other classes of plaintiffs for the very same conduct.'" *Ibid.* (quoting *Waymire* v. *Norfolk & W. Ry.*, 65 F. Supp. 2d 951, 955 (S.D. Ind. 1999), aff'd, 218 F.3d 773 (7th Cir. 2000)). Moreover, the court observed:

> [A]llowing juries in FELA cases to find negligence based on excessive speed, even though it did *not* exceed that set by the FRSA regu-

> lations, would further undermine uniformity, because it would result in the establishment, through such verdicts, of varying, uncertain speed limits at different crossings, as well as different speed limits at the same crossing, depending on the time of day, traffic conditions, and other variables.

Id. at 443–44. Accordingly, the Fifth Circuit held that the FRSA precluded the plaintiff's FELA claim.

The Sixth Circuit's decision here is entirely consistent with both *Lane* and *Waymire*. Indeed, the Sixth Circuit explicitly "agreed" with the Fifth and Seventh Circuits' analysis of the issue in those cases. Pet. App. 8a (citing *Lane* and *Waymire*). Like the circuits to have considered the issue before it, the Sixth Circuit concluded that "any exposure to conflicting standards undermines uniformity" of national railroad safety regulation mandated by Congress. *Ibid.* Given the unanimity among the courts of appeals concerning the preclusive effect of the FRSA, review of this question is not warranted.[10]

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[10] *Grimes* v. *Norfolk S. Ry.*, 116 F. Supp. 2d 995 (N.D. Ind. 2000)—which petitioner quotes (see Pet. 35)—mistakenly states that "the Circuits that have considered the issue" of whether the FRSA precludes FELA claims "are split." *Id.* at 1003. *Grimes* cites *Waymire*, 218 F.3d at 776, in support of that assertion, but the conflict noted in *Waymire* was among various *district* courts. As stated above, each *circuit* to have considered the issue (*i.e.*, the Fifth, Sixth, and Seventh) has concluded that the FRSA precludes a FELA claim when an FRA regulation covers the same subject matter. *See* Pet. App. 7a; *Lane*, 241 F.3d at 443; *Waymire*, 218 F.3d at 777.

B. There Is No Conflict Over Whether 49 C.F.R. § 213.103 Precludes A FELA Ballast Claim.

There is also no conflict among the federal courts of appeals or state courts of last resort concerning the second question presented. Indeed, there can be no conflict inasmuch as the Sixth Circuit is the first and thus far only circuit or state high court to have considered whether the FRSA and 49 C.F.R. § 213.103 preclude a FELA action alleging that a railroad was negligent in its selection of ballast.

Although petitioner cites cases that have, contrary to the decision below, found that 49 C.F.R. § 213.103 does not preclude a FELA claim alleging the negligent selection of ballast (see Pet. 34), each case he cites is from either a district court or an intermediate state court.[11] None is from a federal court of appeals or state court of last resort. In fact, petitioner is unable to identify any decision by any United States court of appeals or state court of last resort, apart from the decision below, that has even considered whether 49 C.F.R. § 213.103 precludes a FELA claim alleging the negligent selection of ballast, much less any such decision "decided * * * in a way that conflicts" with the decision below. Sup. Ct. R. 10.

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[11] One of the cases petitioner cites, *Thomas* v. *BNSF Railway Co.*, No. 07-CV-310, 2008 WL 4981569 (N.D. Okla. Nov. 19, 2008), did not involve ballast or mention 49 C.F.R. § 213.103. Another of the cases he cites, *Davis* v. *Union Pacific Railroad Co.*, 598 F. Supp. 2d 955 (E.D. Ark. 2009), involved ballast, but, unlike this case (see *supra* 13–14), only in an area that "does not support any track or track bed." 598 F. Supp. 2d at 955.

Petitioner asserts that there is a circuit split over "whether 49 C.F.R. § 213.103 covers the subject of walkways adjacent to railroad tracks." Pet. i; *id.* at 29. But even if that were true, this case does not present that question. As noted above (see *supra* 13–14), the court of appeals specifically rejected petitioner's assertion that this case involves walkways "adjacent to the track." Pet. App. 14a. Based on his admissions and contentions in the district court, the Sixth Circuit found that petitioner's allegations of negligent ballast selection concerned areas "where track stability and support are concerned." *Ibid.* Thus, this case involves the selection of ballast that is used to support the tracks, not the construction of walkways adjacent to the tracks.

There is therefore no merit to petitioner's claim (Pet. 30–32) that the decision below conflicts with *Norfolk Southern Railway* v. *Box*, 556 F.3d 571 (7th Cir. 2009), and *Southern Pacific Transportation Co.* v. *Public Utilities Commission*, 820 F.2d 1111 (9th Cir. 1987) (per curiam) ("*SoPac*"). Each of those cases addressed the preemption of state regulations requiring the construction of walkways *adjacent* to railroad tracks, not the preclusion of FELA claims arising from the allegedly negligent selection of ballast used to *support* railroad tracks. Indeed, although he dissented from the decision below and would have held that 49 C.F.R. § 213.103 does not cover the subject matter of petitioner's FELA claim, not even Judge Rogers suggests that the majority opinion conflicts with *Box* or *SoPac*.[12]

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[12] Judge Rogers does not so much as mention *Box*. And although he cites *SoPac*, he does so with a "see also" signal (Pet. App. 20a), indicating that he too recognizes the material dis-

Unlike the FELA claim at issue here, which would have imposed a duty upon the respondent railroad to support its tracks with ballast of a certain size, neither the Illinois regulation at issue in *Box* nor the California regulation at issue in *SoPac* required that a railroad use a particular size ballast to support its tracks. Indeed, neither of the state regulations purported to address track structure at all. The regulation at issue in *SoPac* did nothing more than "require[] railroads to maintain a two-foot wide continuous walkway on each side of their tracks." *S. Pac. Transp. Co.* v. *Pub. Utils. Comm'n*, 647 F. Supp. 1220, 1222 (N.D. Cal. 1986), aff'd, 820 F.2d 1111 (9th Cir. 1987).[13] Similarly, the regulation at issue in *Box* simply required that railroads "provide walkways adjacent to those portions of yard tracks constructed after February 15, 2005 where rail carrier employees frequently work." 92 Ill. Admin. Code § 1546.10(a).

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tinction between (a FELA claim alleging negligence in the selection of) ballast used to support railroad tracks and (a state regulation mandating the construction of) walkways adjacent to railroad tracks.

[13] Moreover, it is far from clear that the result in *SoPac* would be the same today as it was in 1987. The district court decision, which the Ninth Circuit summarily affirmed, rested in part on the district court's view that the FRA had not affirmatively determined that further regulation of employee safety near railroad tracks was unnecessary. See *SoPac*, 647 F. Supp. at 1225–1226. While that might have been true at the time *SoPac* was decided, it is not true today. As noted above (see *supra* 6–7), in 1998 the FRA expressly reaffirmed 49 C.F.R. § 213.103 after a congressionally mandated safety review that had required the FRA to reexamine all of its "regulations related to track safety standards" and to "revise track safety standards" in light of "employee safety." 49 U.S.C. § 20142(a), (b); 63 Fed. Reg. at 33,992.

According to the Seventh Circuit, the state-law requirement addressed in *Box* gave railroads "considerable discretion over the size * * * and materials of the walkways" that the state required be built. 556 F.3d at 574.[14] In contrast, FELA claims like that asserted here would force railroads to use ballast of a particular size and thus deprive railroads of the flexibility they need to satisfy, under widely varying local conditions, the highly detailed federal performance standards that are set forth in 49 C.F.R. §§ 213.55, 213.57, and 213.63 and incorporated in 49 C.F.R. § 213.103. See *supra* 8–10. Indeed, the result in *Box* rests in substantial part on the trial court's determination that the walkway requirement at issue there would not cause drainage problems or otherwise imperil railroad safety, a factual finding that the Seventh Circuit characterized as "not clearly erroneous" given the record in that case. *Box*, 556 F.3d at 574–75. When deciding this case, however, the Sixth Circuit had before it evidence that "yard" ballast, which petitioner maintains respondent was obligated to use to support its track, *does* cause drainage problems and otherwise imperil railroad safety. See *supra* 8–9 & nn.4–5. Thus, even if (contrary to fact) this case did involve walkways adjacent to railroad tracks rather than the selection of ballast used to support those tracks, it is factually distinguishable from *Box*.

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[14] Recognizing that "drainage * * * issues" could affect appropriate ballast size, the Illinois regulation at issue in *Box* does not require the use of ballast at all, but instead allows railroads the flexibility to use, among other materials, "asphalt, concrete, planking [and] grating" when constructing walkways adjacent to tracks. 92 Ill. Admin. Code § 1546.20(a).

So too is *Missouri Pacific Railroad* v. *Railroad Commission*, 948 F.2d 179 (5th Cir. 1991) ("*MoPac*"), another case that petitioner contends is in conflict with *Box*. Like *Box*, but unlike this case, *MoPac* concerned a state regulation "mandat[ing] the construction of walkways 'alongside a railroad track.'" *Id.* at 182. But in *MoPac*, unlike *Box*, the district court found, after conducting a bench trial, "that the construction of walkways would impair drainage and weaken the track support structures." *Id.* at 184. The district court also found that the walkway requirement at issue there would have forced "the railroad to strengthen or enlarge the roadbed beyond [federal] requirements." *Id.* at 183 (internal quotation marks omitted). In affirming the district court's conclusion that the state walkway requirement was preempted by the FRSA under the circumstances of that case, the Fifth Circuit expressly relied on these factual determinations. See *id.* at 183–85. Thus, although the result in *MoPac* is the opposite of that in *Box*, the two decisions are readily reconcilable given their differing facts.

* * *

In sum, this case does not present any question as to which there is conflict among the United States courts of appeals or state courts of final resort. There is no conflict as to whether the FRSA can preclude FELA claims (every such court to consider the issue having agreed it can), nor any conflict as to whether the FRSA precludes the FELA claim asserted here (the Sixth Circuit being the only such court to have considered the issue). Even if there were a conflict as to whether the FRSA preempts state regulations requiring the construction of walkways *adjacent* to railroad tracks, that issue is not presented by this

case, which the court below specifically found only involves allegations concerning the selection of ballast that is used to *support* railroad tracks.

II. THE DECISION BELOW IS CORRECT.

This Court's review of the decision below is also unnecessary because the Sixth Circuit resolved each of the questions presented correctly: The FRSA can preclude FELA claims, and it does preclude the FELA claim asserted here.

A. The FRSA Precludes A FELA Claim Whose Subject Matter Is Covered By An FRA Regulation.

As every circuit to have considered the question has concluded, the FRSA precludes a FELA negligence action when the subject matter of the action is covered by an FRA regulation.

Permitting a FELA action to proceed notwithstanding existence of an FRA regulation covering the same subject matter would undermine the statutory goal that railroad safety regulation "be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). FELA actions, like all common-law actions, are subject to case-by-case adjudication. Thus, liability might be imposed in one case but not another even though the railroad's conduct in the two cases was identical. Faced with inconsistent verdicts returned by different juries, railroads would not know what conduct is required of them. Verdicts that are not merely inconsistent but outright contradictory pose an even greater threat. For example, one jury, hearing a claim brought by a worker suffering arthritic feet (like petitioner here), might hold a railroad liable for using mainline ballast in a particular rail yard, while another jury, hearing a claim brought by

a worker injured in a derailment, might hold that same railroad liable for not using mainline ballast in the very same yard.[15] The railroad would be in an impossible quandary, and Congress's goal of national uniformity in railroad safety regulation would be "eradicat[ed]" "through patchwork litigation." Pet. App. 29a; see also Opinion and Order, at 7, in *Cooper* v. *CSX Transp., Inc.*, No. 05-CV-73392 (E.D. Mich. Oct. 23, 2007) ("Allowing plaintiff's claim to proceed would undermine the goal of national uniformity by resulting in piecemeal litigation across the nation."), *reproduced in* J.A. at 411, *Cooper* v. *CSX Transp., Inc.*, No. 07-2437 (6th Cir.).

Allowing FELA actions to proceed notwithstanding FRA regulations that cover the same subject matter not only would defeat Congress's goal of national uniformity but also would undermine Congress's goal of "promot[ing] safety in every area of railroad operations." 49 U.S.C. § 20101. Each FRA regulation is part of "an integrated undertaking" that comprises "numerous elements." 43 Fed. Reg. at 10,585. Given their interdependence, "[a]s a general rule, it is not possible to regulate an individual hazard without impacting on other related working conditions, nor without impacting on the safe transportation of persons and property." *Ibid.* But the jury

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[15] As the Sixth Circuit was aware when it issued the decision below, the risk of contradictory claims is real, not hypothetical. The petitioner in this case alleges that the defendant railroad used ballast that was too *large*; the plaintiff in *Thanasiu* v. *CSX Transportation, Inc.*, No. CI 0200506962 (Ohio Ct. Common Pleas), by contrast, alleged that the defendant railroad used ballast that was too *small*. See Addendum to Brief of Defendant-Appellee CSX Transportation, Inc., in *Cooper* v. *CSX Transp., Inc.*, No. 07-2437 (6th Cir.).

that is called upon to hear a particular FELA claim considers that claim in relative isolation without due regard for the myriad implications its decision might have on railroad operations.[16] Moreover, even if it did look beyond the plaintiff's narrow claim, a lay jury would lack the knowledge and expertise required to comprehend the far-reaching effects that imposition of a particular common-law standard would have on railroad operations. Precisely because such "piecemeal regulation * * * would be disruptive and contrary to the public interest," it is, in the FRA's view, "essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on long-standing industry practices and pre-existing regulations." 43 Fed. Reg. at 10,585–86. Because FELA tort actions are antithetical to that "informed and deliberate" process, they undermine Congress's goal of "promot[ing] safety in every area of railroad operations" and are therefore precluded to the extent FRA regulations cover the same subject matter.

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[16] In a recent decision finding preemption in the medical device arena, this Court emphasized that "tort law[] applied by juries" produces distorted results because it fails to emulate the cost-benefit analysis that an expert agency would employ. *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008) ("A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court.").

B. The FRA Ballast Regulation Covers The Subject Matter Of, And Therefore Precludes, Petitioner's FELA Claim.

The FRA has promulgated a regulation, 49 C.F.R. § 213.103, specifically governing the selection of ballast. Not only does the ballast regulation constitute an essential part of the agency's broader regulatory scheme, but the FRA expressly decided to leave the regulation unchanged after conducting a congressionally mandated review of the regulation's impact on employee safety. See *supra* 6–7. Given its content, history, and structure, the ballast regulation covers the subject of, and therefore precludes, petitioner's FELA claim.

The FRA ballast regulation is part of "an integrated undertaking." 43 Fed. Reg. at 10,585. For example, subpart (d) of the regulation requires that the ballast "[m]aintain proper track crosslevel, surface and alinement" (49 C.F.R. § 213.103(d)), three technical characteristics for which highly detailed requirements are in turn set forth in 49 C.F.R. §§ 213.55, 213.57, and 213.63 respectively. Similarly, the selection of ballast directly affects drainage and vegetation growth, which are themselves regulated by 49 C.F.R. §§ 213.33 and 213.37 respectively. Given the intricate matrix of regulations of which the ballast regulation is one part, it is clear that a railroad cannot change the ballast it uses "without impacting on other related working conditions" and "without impacting on the safe transportation of persons and property." 43 Fed. Reg. at 10,585.

Allowing ballast claims such as petitioner's to proceed would open Pandora's box. If FELA plaintiffs were permitted to bring claims based on ballast size, not only might railroads be subject to contradictory

jury verdicts for using ballast that is simultaneously deemed both too large *and* too small (see *supra* 24–25 & n.15), but nothing would stop other plaintiffs from basing claims on other aspects of the ballast. For example, a plaintiff might challenge the shape of the ballast used, contending that angular ballast is more difficult to walk on than smooth ballast. But as is true when deciding which size ballast to use in a particular location, railroad engineers must make complex calculations based on local conditions when selecting the most appropriate shape to use. Smooth ballast may be easier to walk on in some locations under some conditions, but precisely because it is smooth it may permit greater slippage than angular ballast, and thus may be less able to satisfy the functional requirements imposed by the FRA track safety regulations. If ballast claims are not precluded, there could be an unending stream of such cases, each subject to *ad hoc* and possibly inconsistent adjudication, and each contrary to Congress's twin goals of national uniformity in railroad regulation and safety in every area of railroad operations.

Accordingly, the Sixth Circuit was correct in holding that "49 C.F.R. §213.103 covers the issue of ballast size" and therefore "precludes [petitioner's] FELA claim[]." Pet. App. 15a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
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STANLEY R. NICKELS,
Petitioner,

v.

GRAND TRUNK WESTERN RAILROAD, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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OTHER

Manual for Railway Engineering (American Railway Engineering and Maintenance of Way Association ("AREMA")) 7

REPLY TO BRIEF IN OPPOSITION

Petitioner, STANLEY R. NICKELS, respectfully submits the following Reply to Respondent's Brief in Opposition to Nickels' Petition for Certiorari.

I. There Is A Conflict Among The Lower Courts Concerning The Questions Presented.

Subsequent to the filing of this Petition of Certiorari, the Northern District of Indiana was faced with the identical issue which is before this Court of whether or not a plaintiff's ballast claim brought under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51-60 was precluded under 49 U.S.C. §20106 formerly part of the Federal Railroad Safety Act of 1970 ("FRSA").[1] Grogg v. CSX Transportation, Inc., No. 1:07-cv-222, 2009 U.S. Dist. LEXIS 83638 (N.D. Ind. September 14, 2009). In denying a motion for summary judgment and ruling that the FRSA did not preclude plaintiff's ballast claim under the FELA, the district court at page 16 of its decision acknowledged that in light of the ruling of the court below in the instant case, a different result would have been reached if the Grogg case had been brought in the Sixth Circuit instead of the Seventh Circuit. In footnote 6 at page 17 of its decision the district court made the following comment:

> While this court certainly respects the Sixth Circuit's decision in Nickels, the fact that

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[1] The FRSA was codified in P.L. 103-272, July 5, 1994, 108 Stat. 866.

> another federal court has held differently on this issue since this court issued its opinion in Wilcox only serves to demonstrate the unsettled, complex, and even confusing state of the law with regard to preclusion issues in FELA cases. (citing Wilcox v. CSX Transp., Inc., Case No. 1:05-CV-107, 2008 U.S. Dist. LEXIS 9387.)

Judge William Lee's statement in the Grogg directly shows why this Court should clarify this FRSA preclusion issue as it pertains to FELA cases. As Judge Lee observed, the state of the law is unsettled and confusing. This case permits the Court to decide the proper interaction between the FRSA and the FELA. Since the passage of the FRSA in 1970, the Court has never reviewed a case which examines the interaction between the FRSA and the FELA. As Grogg so clearly illustrates, a worker residing in the legal jurisdiction of the Seventh Circuit is afforded FELA protection from unsafe walking conditions as all employees had been nationwide for decades. However, because of the decision below, an identically situated railroad worker residing within legal jurisdiction of the Sixth Circuit is denied any potential FELA remedy.

II. Respondent's Brief Never Addresses Petitioner's Argument That The Court Below Erroneously Applied The State Law Preemption Provisions Of 49 U.S.C. §20106 Of The FRSA To Preclude Petitioner's Federal Claim Pursuant To The FELA.

As Petitioner asserted in his opening brief, nothing in the plain or implied language of 49 U.S.C. §20106 suggests that it was the intent of Congress with the

passage of the FRSA to impede or preclude the rights of railroad workers to seek compensation for on the job injuries under the FELA.[2] Despite reviewing the interaction of two federal statutes, the court below improperly applied the state preemption standard contained in 49 U.S.C. §20106 to affirm the dismissal of Petitioner's federal claim pursuant to the FELA. Significantly, in its brief in opposition, Respondent never addresses this issue. Instead of challenging Petitioners's assertion that the court below improperly used the state preemption standards in 49 U.S.C. §20106 to preclude Petitioner's claim, Respondent at pages 16 through 18 of its brief merely points out that other courts in recent years have also improperly applied the state preemption standard contained in 49 U.S.C. §20106 to preclude FELA negligence claims.[3] Respondent fails to recognize that the state preemption provisions of 49 U.S.C. §20106 have no bearing on whether one federal statute, the FRSA, precludes the rights provided under another federal statute, the FELA.

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[2] The court below and other lower courts have confused the concepts of federal preclusion and state preemption; using the rationale of cases where a federal statute take precedence over a state law or regulation and misapplying this preemption concept to the issue of preclusion and whether one federal statute can preclude another.

[3] One of the cases relied upon by Respondent clearly illustrates the confusion which Judge Miller noted concerning this issue, Waymire v. Norfolk and Western Railway Co., 218 F.3d 773 (7th Cir. 2000). First, the Seventh Circuit follows the rationale of state law FRSA preemption cases and holds it must strike the same result in FELA cases for the sake of national uniformity. The Seventh Circuit then goes on to limit the issue of preclusion to the extent the FELA is "inconsistent" with the FRSA. 218 F.3d at 777.

This case provides the Court with the opportunity to reaffirm its holding in Urie v. Thomson, 337 U.S. 163 (1946) that federal railroad safety statutes serve to supplement the FELA. Therefore, it follows that the FRSA should be read together with the FELA to achieve the goals of railroad safety along with the remedial objective of the FELA to compensate injured railroad workers. Unfortunately in recent years, a few courts, like the court below, have relied upon a concern for "national uniformity" expressed in the state preemption standard contained in 49 U.S.C. §20106 to preclude negligence claims brought in FELA cases.[4] This flawed legal analysis has allowed the Respondent to use a non specific track regulation as a guise to immunize itself from liability in a traditional FELA walking condition negligence claim.

The Court in Sprietsma v. Mercury Marine, 537 U.S. 51(2002) rejected the concept of placing national uniformity above safety issues when it came to the matter of boating safety.[5] Consistent with the holding in Sprietsma, this case provides the Court with an opportunity to review the interaction of two safety

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[4] Congress in P.L. 110-432, Sec. 101 made it very clear that safety is the highest priority, not uniformity. See 49 U.S.C. 103(c). Also, Congress in Section 1528 of P.L. 110-53, enacted 8/3/07, amended the preemption title of Section 20106 from "National Uniformity of Regulation" to "Preemption," further indicating that uniformity is not the standard to follow.

[5] Congress in P.L. 110-432, Sec. 101, made it very clear that safety is the highest priority not uniformity. See 49 U.S.C. 103(c). Also, Congress in Sec. 1528 of P.L. 110-53, enacted August 3, 2007, amended the preemption title of 49 U.S.C. §20106 from "National Uniformity of Regulation" to "Pre-emption," as further indication that uniformity is not the standard to follow.

laws, the FRSA and the FELA. Specifically, it allows the Court to clarify that these safety laws should be used in pari materia to enhance railroad safety not to limit it. This is particularly true in this case where Petitioner's negligence theory promotes railroad safety and is completely compatible with the FRSA's purposes.

Despite Respondent's reluctance to address this issue, it is of first impression and of obvious and special importance to rail workers, their families and their employers – the nation's rail carriers. As Judge Lee most recently observed in Grogg, this is an issue which needs clarification and the Court's review of the interaction between the FRSA and the FELA will have significant impact on the many FELA cases pending in the courts across this country. Grogg v. CSX Transportation, Inc., No. 1:07-cv-222, 2009 U.S. Dist. LEXIS 83638 (N.D. Ind. September 14, 2009).

III. Respondent's Argument Ignores The Petitioner's Testimony Which Clearly Demonstrated That Petitioner Made A Walkway Claim Which Was Not Precluded By 49 C.F.R. §213.103

Respondent in an attempt to distinguish this case from Norfolk Southern Railway Co. v. Box, 556 F. 3d 571 (7th Cir. 2009) has contended that Petitioner's ballast claim was limited to the ballast that is used to support track structure. Similar to the court below, Respondent completely ignores the testimony of the Petitioner concerning the unsafe walking conditions which existed along the industrial switching tracks in Lansing, Michigan. During his deposition Petitioner identified nine specific tracks where ballast conditions

created unsafe and unlevel walking conditions. (App. 3a-5a). Petitioner testified that the area he was required to walk adjacent to the track, the ballast should have been leveled and covered with smaller stone, approximately 1/4 inch in size, to provide a more level and smooth walking surface. (App. 5a-7a). Petitioner testified that the walkway stone should have been placed down in an area adjacent to the track approximately two feet adjacent to the extended width of a box car. (App. 7a-8a). Petitioner's testimony was corroborated by other employee affidavits. The walking area adjacent to the railroad tracks, which Petitioner testified needed to be covered with smaller walkway ballast, is the same area adjacent to the railroad track which the Seventh Circuit determined was not covered by 49 C.F.R. §213.103 in Box.

Contrary to Respondent's suggestion, Petitioner's testimony as well as the other affidavits in the record, clearly show that Petitioner's negligence claim concerned the use of large ballast causing uneven and sloped areas in the walkway adjacent to the track where employees were required to walk to perform their work. The Respondent as well as the court below's characterization of Petitioner's claim is limited to areas of track "where stability and support are concerned," is nothing more than an attempt to avoid the holding of Box and the true conflict between its holding and the holding of the decision at issue.

Respondent additionally misinterprets the record below in an attempt to distinguish the Seventh Circuit's holding in Box. At page 22 of its brief Respondent factually distinguishes the evidence presented in Box with the evidence in this case by arguing the court below relied on alleged evidence

regarding drainage problems caused by the use of smaller ballast. However, the court below never referenced the size of ballast and drainage as a factual consideration at any point in its opinion. Thus, the alleged factual distinction between the decision below and Box regarding yard ballast's alleged drainage concerns is non-existent. To this point, Respondent fails to cite the Manual for Railway Engineering published by the American Railway Engineering and Maintenance of Way Association ("AREMA"). (App. 10a-11a). §2.10.4(d) of The Manual for Railway Engineering provides in part:

> Rail yards and some industrial tracks are generally graded from 1 inch to 3/8 inch (AREMA, No. 5 gradation, Table 2.2) to provide improved walkway and safety conditions along the track. The finer gradations for yard applications do not restrict track drainage...

Contrary to Respondent's suggestion, the AREMA railroad track maintenance industry standards recommend the very type of ballast which Petitioner testified should have been placed along the industrial tracks in the Lansing, Michigan area where he worked. Further, the yard ballast does not impact drainage.

Judge Rogers' dissent in the court below noted that this case is no different from one in which a railroad worker brings a FELA claim for being injured by debris when ballast is carelessly unloaded into place. (App. 19a). As Judge Rogers further observed in his dissent, nothing in 49 C.F.R. 213, *et seq.*, contemplates that there can categorically be no negligence with respect to a railroad's construction, maintenance or

use of ballast. Unlike the Respondent and the majority in the court below, Judge Rogers properly reviewed the evidence in this case and found that Petitioner presented a valid FELA negligence claim concerning unsafe walking conditions.

IV. Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX 1

DEFENDANTS' EXHIBIT B

In The Matter Of:

Stanley Nickels v.
Grand Trunk Western Railroad, Inc., et al

Stanley Nickels
November 16, 2006

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* * *

[p.97] A: I believe it's Rite-Aid mostly now.

Q: Was it another place previously?

I take it that's in Owosso.

A: Correct. Shiawassee.

Q: Was there another pharmacy where you would get your prescriptions filled over the years?

A: Over the years?

Q: Yes.

A: Oh, Walgreen's.

Q: Also in Owosso?

A: Correct.

Q: Where else? Anywhere else?

A: Not that I remember.

Q: Let's go over your Complaint itself. I have read your Complaint. I appreciate that you're talking about complaining that the ballast that you worked on in certain places was oversized. Can you tell me where your complaints of oversized ballast were, what locations, or are you telling me that every one of the locations you have described that you ever worked at had bad ballast.

A: Not every one.

Q: So can you, from the many places we have described, tell me where it is you feel the [p.98] ballast was oversized and therefore you're believing that had some role in your foot pain that you have today?

A: Most of Lansing.

Q: When you say most of Lansing --

A: For bad ballast.

Q: And when you say bad ballast, what is it that was bad?

A: Uneven, too large of ballast, sometimes too much ballast and not leveled out.

Q: Is there a particular area in Lansing where this was a condition, a particular set of tracks?

A: It's hard to remember everything because you get used to walking on good ballast, bad ballast. But West Yard Storage I believe is terrible and West Yard Pass, Long Pass, Long Storage.

Q: Let's slow down for just a touch for me.

So in Lansing, the first place within Lansing that you described was West Yard?

A: West Yard Pass.

Q: West Yard Pass. Do those tracks have numbers, some way to reference them?

A: No.

Q: Okay. But those in the industry, when you say West Yard Pass, they will know what you're [p.99] talking about?

A: They'll know.

Q: Okay.

A: They have maps of them.

Q: Fine. Then where else in Lansing?

A: Long Pass.

Q: Long Pass. All right.

A: Long Storage.

Q: Where else?

A: River Track. Pennsylvania Avenue.

Q: Anyplace else?

A: I can't remember what tracks down at the coal dock, what they were called. But you had to walk partly on main line and stuff to check your cars.

Then the main line during the day in Lansing, westbound track, the main line was closed down and used as a yard track.

Q: Say that again now.

A: The double main line going through Lansing there by the dock, double main --

MR. ACKER: Which dock is that? Does that dock have a name?

THE WITNESS: No. The Olds dock.

MR. ACKER: Olds dock. Okay. [p.100] Thanks.

I'm sorry, I didn't mean to interrupt.

MR. LIDDANE: That's all right.

A: 12 track is the Olds.

BY MR. LIDDANE:

Q: So that double main line, the westbound track was shut down you said?

A: Correct, and used as a yard track. Used as switching purposes.

Q: What was it about the ballast there that was troublesome?

A: You had to be on both sides of the -- you would use that for your outbound cars. So when you get ready to leave at night and you're done working, you have to walk all your cars. Well, you have to walk them prior to that, too. You got to take handbrakes off that you're putting on before you move them and so you are walking on main line ballast and there is no reason for it.

Q: Okay.

A: Even though it's a main line during the day, if you are going to switch there during the day then make at least one side of them smooth walking.

Q: Okay.

* * *

[p.113] complaining about as to West Yard, right up on the ties or down at the base of the slope, or where?

A: Sometimes they're slopes. Sometimes there is too much ballast. They just didn't take care of it correct.

Q: Let's focus on the West Yard Pass, the one you're describing. How large was the ballast there? Did you ever measure it?

A: Um, inch and a half.

Q: Was there something about that size that you found objectionable?

A: Oh, yes.

Q: Why? What's wrong with that?

A: If they don't keep it completely level and compacted or do something it's really rough to walk on. It's like large pea stone.

Q: Okay.

A: It's hard to get traction, you know. Then if it's slippery or if it's raining they get slipperier.

Q: So are you saying that it's too small or too large?

A: I'm saying to do it right or what I would say right, you get that leveled out, at least get it [p.114] level, minimum level. If you want to do a good job you get it level and bring in some little bit smaller stone, say, like quarter inch, and fill up the gaps and level it out. You can make it darn near like a cement sidewalk if they do it right. I have seen it right.

Q: And that area that you would like to have seen that kind of change, how close is that to the track itself? Are you talking about a walkway at the base, the toe path, or are you talking about right up near track?

A: I'm talking about where you're supposed to walk legally.

Q: So that's not next to the track then, is it? You are talking about-

A: (Interposing) Yeah, it's next to the track. You have to.

Q: Well, let's talk about what we mean by next to.

In terms of distance from the track itself, how many feet are separating the area you're talking about walking from?

A: You mean like from West Yard Pass to West Yard Storage, how many feet apart are those tracks?

Q: No. That wasn't my question. Let me ask it again.

[p.115] When you're describing a desire to have ballast leveled out more at West Yard Pass and perhaps quarter inch stone put in to level it out, from the tie end of the track, the West Yard Pass track, how far is it to this area where you think this sort of corrective measure should be accomplished, how many feet?

A: Well, a rail car hangs over the rail about a foot and a half and it's nice to have two foot wide to walk on. So from the end of that or from the rail side, I would say three foot. From the boxcar side, two and a half, two foot.

Q: All right.

A: I mean I'd settle for one foot.

Q: And instead what do you contend is there during the time that you were working along that track in terms of space to work and walk?

A: Say that again, please.

Q: Are you saying that there was simply no space to walk where the ballast was smooth and proper size next to that track?

A: Possibly on one side there was a smooth, there was smooth.

Q: Okay.

A: But it doesn't matter, when you work tracks you [p.116] got to work both sides of the track.

Q: Did you ever make a specific complaint regarding working on the main line, that double main west shutdown track, or that West Yard Pass, did you ever make a complaint about the ballast conditions to a supervisor?

A: Oh, I have complained to men I work with, you know. They didn't like it, either.

Q: So you complained to your co-workers.

Did you ever make a specific complaint to a supervisor about those conditions?

A: Um, no more than saying something to like Denny or Dave Mingas.

Q: Who is Denny and who is Dave Mingas?

A: They were people I worked with.

Q: They are co-workers?

A: Right.

Q: They weren't your supervisor?

A: No.

MR. LIDDANE: Off the record.

(A brief discussion was held off the record.)

MR. LIDDANE: Back on the record.

* * *

APPENDIX 2

[PLAINTIFF'S EXHIBIT 4]

Roadway and Ballast

* * *

2.10.4 BALLAST GRADATIONS (1988)

a. The gradation of a ballast material is a prime consideration for the in track performance of ballast materials. The gradation must provide the means to develop the compactive or density requirements for the ballast section and provide necessary void space to allow proper run off of ground water.

b. Ballast gradations should be graded uniformly from the top limit to the lower limit to provide proper density, uniform support, elasticity and to reduce deformation of the ballast section from repeated track loadings.

c. The AREMA mainline ballasts are graded in three sizes from 2½ inches to ¾ inches, 2 inches to 1 inch and 1½ inches to ¾ inch; however, two additional gradations No. 25 and No. 4-A have been added to the specification to meet requirements of the railroads.

d. Railyards and some industrial track gradations are generally graded from 1 inch to ¾ inch,

(AREMA No. 5 gradation, Table 2-2), to provide improved walkway and safety conditions along the track. The finer gradations for yard applications do not restrict track drainage as the construction practices for yard facilities provide quick run off of ground water through the means of under track and yard drainage systems. A consideration in the selection of the proper ballast gradation is the selection of a ballast that will limit the amount of material removed from the track section during undercutting operations. Most undercutting operations remove all of the material below the ¾ inch size. Limiting the amount of the ¾ inch material in the original gradation will reduce the amount of ballast removed when undercutting operations are used to clean and restore the track ballast section. The larger ballast gradations being used on the railroads today do not increase the cost of tamping. Mechanization has eliminated most of the necessity for manual labor in the roadway maintenance practices.

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